123-1

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 102.

THE NORTHERN PACIFIC RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

RICHARD MARES.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF DAKOTA.

FILED OCTOBER 14, 1884.

SUPREME COURT OF THE UNITED STATES.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of Dakota Territory, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, between Richard Mares, plaintiff and respondent, and the Northern Pacific Railroad Company, defendant and appellant, a manifest error hath happened, to the great damage of the said Northern Pacific Railroad Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, on the 8th day of October, A. D. 1883.

[Seal Supreme Court of Dakota Territory.]

B. S. WILLIAMS, *Clerk.*

2 [Endorsed:] In the Supreme Court of the United States. Northern Pacific R. R. Co., pl'ff in error, *vs.* Richard Mares, def't in error. Original writ of error. Copy. Filed July 31, 1884. B. S. Williams.

3 TERRITORY OF DAKOTA, *County of Cass:*

In District Court, Third Judicial District.

RICHARD MARES, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

To Richard Mares, plaintiff, and to his attorneys, Briggs & Elders, Wilson & Gale, and Wilson & Ball, and to the clerk of said court:

Please take notice that the defendant in the above-entitled action hereby appeals to the supreme court of the Territory of Dakota from the judgment therein made and entered in the said district court on the 10th day of April, 1884, in favor of the plaintiff in said action and against the defendant, and from the whole thereof; also from the order denying and overruling defendant's motion for a new trial in said action, dated March 18th, 1884, and filed therein April 3rd, 1884.

Dated Fargo, D. T., May 1st, 1884.

W. P. CLOUGH &
THOMAS & BENTON,
Defendant's Attorneys.

We hereby admit personal service of a copy of the within notice of appeal this 1st day of May, 1884.

THOMAS WILSON &
WILSON & BALL,
Plaintiff's Attorneys.

Filed May 1st, 1884.

N. C. MORGAN, *Clerk*,
By E. R. WILSWELL, *Dep.*

4 TERRITORY OF DAKOTA, *County of Cass:*

District Court, Third Judicial District.

RICHARD MARES *vs.* NORTHERN PACIFIC RAILROAD COMPANY.

Whereas the defendant in the above-entitled action is about to appeal to the supreme court of the Territory of Dakota from the judgment rendered and entered against it in said action in said district court in favor of the plaintiff, on the 10th day of April, 1884, for the sum of twenty thousand dollars damages and thirty-six and $\frac{25}{100}$ dollars costs, making the total sum of $20,036.25:

Now, therefore, in consideration of the premises and of such appeal, we, the undersigned, the Northern Pacific Railroad Company, by W. P. Clough, its attorney, and Chauncy W. Griggs, of Saint Paul, in the State of Minnesota, and Patrick H. Kelley, of the same place, and Geo. S. Barnes, of Fargo, in the Territory of Dakota, as sureties of the Northern Pacific Railroad Company, do hereby jointly and severally undertake and promise on the part of the appellant that the said appellant, the defendant in said action, will pay all costs and damages which may be awarded against it on appeal, or on the dismissal thereof, not exceeding the sum of two hundred and fifty dollars; to which amount we acknowledge ourselves jointly and severally bound.

And whereas the appellant is desirous of staying the execution of said judgment so appealed from, we do further, in consideration thereof and of the premises, jointly and severally undertake and promise and acknowledge ourselves further jointly and severally bound in the further sum of twenty thousand thirty-six and
5 twenty-five one-hundredths dollars ($20,036.25), being the amount of said judgment and the amount therein directed to be paid; that if the said judgment appealed from or any part thereof be affirmed, or the appeal be dismissed, the appellant will pay the amount directed to be paid by said judgment, or the part of such amount as to which the judgment shall be affirmed, if it be affirmed only in part, and all damages and costs which shall be awarded against the appellant upon the appeal.

Dated April 28th, 1884.

NORTHERN PACIFIC RAILROAD COMPANY,
By W. P. CLOUGH, *Its Attorney.*
CHAUNCY W. GRIGGS.
PATRICK H. KELLY.
G. S. BARNES.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

Chauncy W. Griggs and Patrick H. Kelley, being duly sworn, each for himself and not for the other, deposes and says that he is a resident and freeholder of Saint Paul, in the State of Minnesota, and that he is one of the sureties who executed the foregoing undertaking, and that he is worth double the amount specified therein over and above all his debts and liabilities and over and above all exemptions.

PATRICK H. KELLY.
CHAUNCY W. GRIGGS.

Subscribed and sworn to before me this 29th day of April, 1884.
[NOTARIAL SEAL.] E. S. STEVENSON,
Notary Public, Ramsey Co., Minn.

6 TERRITORY OF DAKOTA, } ss:
County of Cass, }

George S. Barnes, being duly sworn, deposes and says that he is a resident and freeholder of Fargo, in the county of Cass and Territory of Dakota, and that he is one of the sureties who executed the foregoing undertaking, and that he is worth double the amount specified therein over and above all his debts and liabilities and over and above all exemptions.

G. S. BARNES.

Subscribed and sworn to before me this 1st day of May, 1884.
[NOTARIAL SEAL.] CHARLES W. DARLING,
Notary Public, Cass Co., D. T.

We hereby admit personal service of a copy of the within undertaking this 1st day of May, 1884.

THOMAS WILSON &
WILSON & BALL,
Plaintiff's Attorneys.

Filed May 1st, 1884.

N. C. MORGAN, *Clerk,*
By E. R. WISWELL, *Dep.*

7 TERRITORY OF DAKOTA:

In the District Court in and for Cass County, Third Judicial District.

RICHARD MARES, Plaintiff,
against
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

The Territory of Dakota sends greeting to the Northern Pacific Railroad Company, defendant:

You are hereby summoned and required to answer the complaint of the above-named plaintiff, a copy of which complaint is hereto annexed and herewith served upon you, and to serve a copy of your

answer on the subscribers, Briggs and Elders, at their office, in the city of Fargo, Cass county, Dakota Territory, within thirty days after the service of this summons on you, exclusive of the day of such service; and if you fail to answer said complaint within the time aforesaid the plaintiff will apply to the court for the relief demanded in the complaint.

Dated November 16th, 1882.

WILSON & GALE,
Winona, Minnesota,
BRIGGS & ELDERS,
Fargo, Dakota Territory,
Attorneys for Plaintiff.

8 TERRITORY OF DAKOTA, *County of Cass:*

District Court, Third Judicial District.

RICHARD MARES, Plaintiff,
against
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

The plaintiff complains and alleges—

I.

That the defendant is and for five years last past has been a corporation created and organized under the laws of the United States, and especially under an act of Congress entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific coast, by the northern route," approved July 2nd, A. D. 1864, and the acts amendatory thereof.

II.

That defendant has during all the time aforesaid owned and operated and still owns and operates a line of railroad from the city of Duluth, on Lake Superior, in the State of Minnesota, to the city of Bismarck, in the Territory of Dakota; and during all of said time had and used a yard at the city of Fargo, on said line of railroad, in said Territory, for the purpose of its said road.

9 And in said yard defendant has all the time aforesaid been accustomed to and did switch and distribute very many cars each day and each night, and was accustomed to and did then and there make up trains of cars each day and each night, and, for the purpose of aiding in and performing said work, it (defendant) had and used during all the time aforesaid, a switch-engine, so called, or a locomotive propelled by steam.

And on the said switch-engine, used and while being used for the purpose aforesaid in the said yard, at the time of the injury to the plaintiff hereinafter charged, this defendant employed and had as an engineer one Norman A. Bassett; that said engineer was a man of hasty and excitable disposition and ungoverned, violent, and

hasty temper and was and had for a long time been, while in the employ of this defendant as engineer, accustomed to become unduly and dangerously excited and angry, and while under the influence of anger or excitement, and while in the performance of his duty as engineer, was and had been accustomed to act and conduct himself as engineer in a most reckless manner, causing great danger and peril to his fellow-servants and especially to the brakemen on the train or cars attached to or moved by the engine on which he was engineer.

That the defendant well knew and by the use of reasonable diligence might have and would have discovered and known long before the injury to the plaintiff (hereinafter referred to) that the said Bassett was hasty and reckless and ill-tempered in the performance of his duties as engineer, and that he was, therefore, an unsafe and unfit person to be engineer. The plaintiff further avers that
10 the said engineer was, at the time of the injury hereinafter referred to, and for a long time prior thereto had been, negligent, unskillful, unfit, and incompetent to act as engineer of said switch-engine or of any engine or locomotive; of which facts the defendant had notice and knowledge, and by the use of ordinary diligence defendant would have discovered and learned that he was a negligent and an unfit, unskillful, and unsafe engineer.

And this plaintiff had not notice or knowledge prior to the injury to him hereinafter referred to that the said engineer was for any reason or on any account an unfit or unsafe person to act as engineer.

III.

That on the 31st day of October, A. D. 1881, at the said city of Fargo, in the said Territory of Dakota, this plaintiff was in the employ of the defendant as a brakeman, in the said yard of the defendant at Fargo, and was required in the performance of his duties as switch-brakeman to set or fasten or to loosen the brakes of the cars which were being switched or moved in the said yard, and he was at the time and place aforesaid required to perform the said duty on the cars of the defendant, which were being switched and moved by the engine in which the said Bassett was engineer, and in the moving of cars it was his duty as brakeman to give signals to the said engineer and of the said engineer to obey such signals; that at the time (Oct. 31st, 1881) and place aforesaid, and while this plaintiff, in the performance of his duties as brakeman as aforesaid, was upon the top of the freight car (part of a train) being removed in
11 the said yard by the engine in which the said Bassett was engineer, and while the said Bassett had control of and was managing said engine, this plaintiff, as it was his duty to do, gave the said engineer a signal to move and "back" the cars attached to the said switch-engine the length of a certain number of cars indicated by the signal.

And the plaintiff, as he was in duty required to be, was standing on the top of the rear car so being moved backward, and before said cars had been moved backward the distance which they were in-

tended to be removed and the distance which the signal, given by this plaintiff, required them to be removed the said engineer unskillfully, negligently, recklessly, and suddenly, and contrary to his duty, stopped and reversed the said switch-engine and the cars attached thereto and thereby threw the plaintiff off the rear car, where he was standing and where it was his duty to stand, to the ground, and thereupon the said engineer suddenly, negligently, recklessly, and violently and unskillfully then and there, and before the plaintiff had time to or could move out of the reach of the cars or off the track, moved and pushed the said engine and cars backward upon said track and on to and over the plaintiff, and thereby greatly injured the plaintiff and crushed and broke both of his legs, so that it then and there became and was necessary to amputate them, and they were then and there on account of the said injuries amputated, and this plaintiff then and there and ever since has on account of the injuries aforesaid suffered great pain and been put to great expense for physicians and surgeons to amputate his said legs and to cure and heal him, and he has paid out or become liable to pay by reason of the injuries aforesaid to said physicians and surgeons the sum of $300, and for medicine and nurses the sum of $200; and he will always hereafter so long as he may live suffer great pain and be unable to perform any work or labor.

12 That he has suffered damages by the said injuries to the amount of twenty-five thousand dollars.

Wherefore the plaintiff demands judgment against the defendant for the sum of twenty-five thousand dollars besides his costs and disbursements in this action.

WILSON & GALE AND
BRIGGS & ELDERS,
Plaintiff's Attorneys.

13 STATE OF MINNESOTA, }
County of Winona, } ss:

Richard Mares, being first duly sworn, deposes and says that he is the plaintiff in the above-entitled action; that he has heard read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

RICHARD MARES.

Subscribed and sworn to before me this 28th day of November, A. D. 1882.

H. W. HILL,
Notary Public.

14 [Endorsed:] Territory of Dakota, district court. Richard Mares, plaintiff, *vs.* N. Pac. R. R. Co. Summons and complaint. Original.

Due service of a true copy of the within summons and complaint is hereby admitted on this 30th day of November, A. D. 1882.

W. P. CLOUGH,
Attorney for Defendant.

Answer of the Defendant to the Complaint of the Plaintiff.

TERRITORY OF DAKOTA, *Cass County:*

District Court, Third Judicial District.

RICHARD MARES, Plaintiff,

vs.

NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

First.

The defendant admits the allegations of paragraph 1 of the complaint.

Second.

The defendant further admits that at or about the time stated in the second paragraph of the complaint the defendant owned and operated a line of railroad substantially as in said paragraph set forth, and that it had and used at Fargo a railroad yard substantially as in said paragraph alleged, and that it employed in said yard, during the time mentioned in said paragraph, one Norman A. Bassett as engineer in charge of a switch-engine then used for handling cars and trains of cars in the said yard.

The defendant denies each and every allegation contained in the said second paragraph, save as hereinbefore expressly admitted.

Third.

The defendant admits that at or about the time mentioned in third paragraph of the complaint the plaintiff was in the employment of the defendant at the said yard and that the duties of the plaintiff as such employé were substantially as in the said paragraph set forth.

Defendant further admits that at or about said date the plaintiff was on the top of a certain car of the defendant in the said yard and that he, the plaintiff, then and there fell from the top of the said car and received injuries on account of said fall substantially of the character set forth.

Further answering, the defendant denies each and every allegation in the said third paragraph contained, save as hereinbefore expressly admitted; and it further denies that the damages suffered by the plaintiff on account of the said injuries exceeded the sum of $5,000.00.

As to whether the plaintiff has ever expended any sum of money whatever or has ever become liable to expend any sum of money whatever on account of medical or surgical treatment for his said

injuries, this defendant has no knowledge or information sufficient to form a belief; but this defendant avers that, nothwithstanding this defendant was under no obligation so to do, it did, nevertheless, as a matter of mere charity, cause the wounds received by the plaintiff, as in the complaint set forth, to be dressed and all necessary surgical and medical treatment to be furnished to the plain-
18 tiff, and all necessary care and attention, at the sole charge and cost of this defendant, during a long period after the happening to the plaintiff of the said injuries.

Fourth.

The defendant further avers that the said fall of the plaintiff and his said injuries resulting therefrom were solely caused either by the negligence of the plaintiff himself or by that of some one or more of the other employes of the defendant engaged at work together with the plaintiff in the defendant's said yard at the time of the happening of the said injuries, and not by any negligence or fault on the part of this defendant.

Wherefore the defendant prays to be hence dismissed with its costs and disbursements in this action.

W. P. CLOUGH,
Att'y for Def't.

Verification by att'y.

19 TERRITORY OF DAKOTA:

In the District Court in and for Cass County, Third Judicial District.

RICHARD MARES, Pl'ff,
against
THE NORTHERN PACIFIC RAILROAD COMPANY, Def't.

The plaintiff, replying to the new matter set up in the answer herein, denies the same and each and every allegation and part thereof.

Dated Winona, Minn., Jan'y 1st, 1883.

WILSON & GALE,
Winona, Minn.
BRIGGS & ELDERS,
Fargo, Dakota Territory,
Att'ys for Plaintiff.

STATE OF MINNESOTA, }
County of Winona, } *ss:*

Richard Mares came before me personally, and, being duly sworn, doth say that he is the plaintiff in the above-entitled action; that the foregoing reply is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

RICHARD MARES.

Subscribed and sworn to before me this 2nd day of Jan'y, 1883.
[NOTARIAL SEAL.] E. HILL,
Notary Public.

20 *Statement on Motion for A New Trial.*

TERRITORY OF DAKOTA, *County of Cass:*

In District Court, Third Judicial District.

RICHARD MARES
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY.

This is an action for personal injury brought by the plaintiff against the defendant on the ground of alleged negligence on the part of the defendant, as set forth in his complaint.

The defendant answered, to which answer reference is hereby made to show its contents.

The cause, being regularly called on the 26th day of June, 1883, at the regular June term of this court for said year, the clerk of this court drew from the trial jury box the ballots containing the names of twelve of the jurors summoned, and said jurors, whose names had been drawn as aforesaid, were duly sworn to answer such questions as might be put to them touching their qualifications to act as jurors for the trial of said cause; and thereupon the plaintiff challenged for cause Ely Green, one of said jurors, under subdivision three of section 244 of the code of civil procedure of Dakota Territory, and the defendant then and there resisted said challenge, and the following testimony was adduced on the trial of said issue:

Question to said Ely Green. What is your relation to the Northern Pacific Railroad Company, Mr. Green; what is the nature of it?

A. Well, I have a contract with them for furnishing feed for the stock that is shipped over the road.

Q. That is a standing contract between you and them that you should furnish them feed?

21 A. Yes, sir.

By ATTORNEY FOR DEFENDANT:

Q. Is this contract with the company?

A. The Northern Pacific Railroad Company—yes, sir.

Q. Or with the parties shipping over the road?

A. No, sir; it's with the company.

By ATTORNEY FOR PLAINTIFF:

Q. Do they pay you so much per ton or so much per bushel?

A. Yes, sir.

Q. They agree to pay you so much per ton for the hay furnished?

A. I furnish it and they allow me to charge the cattlemen—the men that have the cattle—so much per ton.

Q. In other words, they employ you to furnish the hay and then they authorize you to charge the shipper so much?

A. Yes, sir.

Q. Then you really are furnishing this hay under their employ? Isn't it a fact, Mr. Green, that you are furnishing this hay under the instructions of the Northern Pacific Railroad Company?

A. No; I have a contract with them to furnish hay for the cattle shipped over this road and take care of the company's stock-yards, and charge so much for the hay.

Q. In other words, you agree to furnish hay for them and to take care of the stock-yards for them and to collect compensation for that from those who ship the stock?

A. Yes, sir.

Q. That's it, isn't it—over their road?

A. Yes, sir.

22 By ATTORNEY FOR DEFENDANT:

Q. Now, Mr. Green, do you get any compensation from the railroad company direct?

A. No, sir.

Q. You make no remittance to them?

A. Sir?

Q. You send no money to them?

A. No, sir.

Q. You have nothing to do with the company, except the fact that you enjoy the privilege of furnishing hay to the men wh areo taking stock over the road. Isn't that the fact?

A. Yes, sir.

Q. You get your pay from the stockmen and from them alone, do you not?

A. It comes indirectly from them; the railroad company collects it for me.

Q. The stockmen pay for the hay, do they?

A. Yes, sir.

Q. Men taking stock over the road pay for the hay?

A. The greater part of it they pay the railroad company for; the railroad company collects it for me.

Q. The company do not pay for the hay?

A. Directly they do.

Q. Well, that's simply a matter of accommodation; it's paid through the agent; the stockmen pay for the hay, do they not?

A. Yes, sir.

Q. Pay you through the agent of the Co.?

A. Yes, sir.

Q. He collects the money for you simply as a matter of accommodation to you?

23 A. The stockmen pay this when they pay their freight bills at the end of the road.

Q. As a matter of accommodation and convenience, the agent collects the money for you?

A. Yes, sir.

Q. You give your bill to the agent?

A. Part of it.

Q. Does any money come to you from the Northern Pacific Railroad Company for the hay you furnish?

A. It don't come directly from them, it is only as they collect it for me.

The above and foregoing being all the testimony adduced upon said issue as to the qualification of said Green—

Thereupon the court sustained said challenge for cause, and the defendant, by its counsel, then and there duly excepted to said decision.

And the plaintiff also then and there challenged EBON YOUNG, one of said jurors called and sworn as aforesaid, for cause, and the defendant then and there resisted said challenge, and the following testimony was then and there adduced on the trial of said issue.

The following questions were put to said Young by plaintiff's counsel:

Q. Mr. Young, let me ask you a few questions, please. You, as I understand you, state that you are doing business on the right of way of the Northern Pacific Railroad Company?

A. Yes, sir.

Q. What kind of business?

A. Lumber business.

Q. How long have you been doing that business?

A. Four years.

Q. Do they furnish to you a place for your yard?

A. Yes, sir.

24 Q. Free of charge?

A. Yes, sir?

Q. You have a right to remain there just as long as they permit you, and no longer?

A. Yes, sir.

Q. Then you are a tenant at sufferance—they furnish you the ground for your yard and for general use, but you have it just so long as they permit you to remain there; when they don't wish you to, they can turn you off?

A. I have a lumber yard on their right of way. I suppose they have a right to turn me off any time they choose.

Q. You are purchasing lumber and piling it there and doing business there?

A. Yes, sir.

By ATTORNEY FOR DEFENDANT:

Q. You say you are in the lumber business?

A. Yes, sir.

Q. You unload your lumber upon the right of way?

A. Yes, sir.

Q. That right of way is not used at that place by the company, is it?

A. No, sir.

Q. The company has no use for it at present?

A. Not that I know of.

Q. Then the company simply does not interfere with you in your use of it?

A. They gave me permission to use it.

Q. How long have you been using it?

A. Four years.

Q. And have not been interfered with by the company during that time?

A. No, sir.

25 Q. You pay anything for the privilege?

A. No, sir.

The above and foregoing being all the testimony adduced upon said issue as to the qualifications of said Young—

Thereupon the court sustained said challenge for cause, and the defendant, by its counsel, then and there duly excepted to said decision.

Thereupon a jury was impanelled and duly sworn on said 26th day of June, 1883, and thereupon the plaintiff, to maintain the issue on his part, under the pleadings in said action, introduced the following testimony:

26 *The Trial. Plaintiff's Evidence.*

RICHARD MARES, called as a witness in his own behalf, being first duly sworn, testified as follows:

Q. Mr. Mares, you are the plaintiff in this action?

A. Yes, sir.

(Thereupon the defendant, by its counsel, objected to the introduction of any evidence under the complaint for the reason that it does not state facts sufficient to constitute a cause of action; which objection was then and there overruled by the court; to which ruling the defendant, by its counsel, duly excepted.)

Q. What is your age?

A. Twenty-six.

Q. You are twenty-six years of age?

A. Yes, sir.

Q. How long ago were you injured?

A. A year ago last November—or October, rather.

Q. What time in October, do you remember?

A. It was the 31st, I believe.

Q. The 31st of October a year ago—that was in 1881?

A. Yes, sir.

Q. Prior to that time, Mr. Mares, what has been your business?

A. Well, I had been farming in the summer time.

27 Q. That is, the summer before that. Prior to that time what had been your business?

A. Blacksmithing, principally.

Q. Your father is a blacksmith?

A. He is.

Q. You learned your trade with him?

A. I did.

Q. Worked at it some time. How long had you worked at your trade?

A. Well, I had worked at it off and on at different times probably nearly two or three years.

Q. After you learned it how much could you have earned at your trade of blacksmith per day?

(The defendant objects to this question upon the ground that it is incompetent; which objection is overruled by the court; to which ruling the defendant duly excepts.)

A. Well, I don't know that I can really answer that question; of course it depends something on where a man was. The general wages was——

Q. You need not state that. Mr. Mares, how long ago did you leave the business of blacksmithing?

A. Well, I haven't done any blacksmithing for a year before I was hurt. About a year before I was hurt, I think.

Q. What did you go at when you left blacksmithing?

A. I went onto a farm.

Q. Where?

A. Southwest of Wheatland.

Q. In this Territory?

A. Yes, sir.

Q. Did you own a farm there?

A. I do.

Q. Did you when you were hurt?

28 A. I did.

Q. How large a farm?

A. 160 acres.

Q. Had you any improvements on it?

A. I had.

Q. How much?

A. I had about one hundred acres broke.

Q. Had you any stock on it?

A. I had.

Q. What?

A. I had four head of horses.

Q. Did you say that you worked that farm the summer before you came in here—the autumn of which you were hurt?

A. I did.

Q. Then you came in here in the autumn?

A. Yes, sir.

Q. How long before you were injured did you come into this place and go to work on this railroad?

A. About two weeks, I believe.

Q. Two weeks, according to your best recollection?

A. Yes, sir; it was.

Q. Permit me to ask you what had been your health up until the time of this injury?

A. It had been good.

Q. Well, generally or always, how was that?

A. Always.

Q. Whether it was good or very good, you say, was always good?

A. Yes, sir.

Q. Were you or were you not an able-bodied man?

A. I were.

Q. You say about two weeks before you were injured you came in here and engaged to work at what with this company?

29 A. At switching in the yard.

Q. For the Northern Pacific Railroad Company?

A. Yes, sir.

Q. In what yard?

A. In the Fargo yard.

Q. Had you worked at the business of railroading, braking, or otherwise before; if so, where and when?

A. I had; the winter before I worked here in the Fargo yard.

Q. The winter before?

A. Yes, sir.

Q. Where had you worked the summer before that?

A. I worked on my farm.

Q. And the winter before you came in here and worked in the yard all winter?

A. The winter before I came——

Q. You worked the summer before you were hurt out on your farm?

A. Yes, sir.

Q. The winter before that you worked in this yard?

A. Yes, sir.

Q. And the summer before that you worked on your farm?

A. Yes, sir.

Q. That's right, is it?

A. Yes, sir.

Q. Now, had you ever worked at railroading before?

A. I had.

Q. In what capacity, where, and how long?

A. I was at work on the Northwestern one summer.

Q. Where?

A. Between Sleepy Eye and Redwood Falls.

Q. Between Sleepy Eye and Redwood Falls?

A. Yes, sir.

30 Q. That branch of that road 26 miles long?

A. Yes, sir.

Q. Worked there all summer?

A. No; not all summer.

Q. Well, about how long?

A. I was there about two months, I think, as near as I can remember; something near that.

Q. Well, I am merely getting your best recollection; I don't suppose you remember to a day or week; I want to get your best recollection. Had you, except the time you have now stated to us, ever worked at railroading before?

A. I had.

Q. Where and when?

A. I never had worked but very little before that.

Q. I don't expect you can tell to a day.

A. I can't tell just to the date; it was some two or three years before that.

Q. About how long then?

A. Well, only a short time.

Q. How long?

A. Well, not to exceed two or three trips at a time.

Q. Well, a trip would have been a day or two days, or what?

A. About two days.

Q. Then you had worked about a week before that?

A. Yes, sir.

Q. Now, have you given us all the railroading you have ever done?

A. Yes, sir.

Q. Now, Mr. Mares, when you came in here with whom did you employ to go to work, and what was your duty?

A. Mr. Fulton, I believe, was the man I hired to.

Q. Fulton?

A. Yes, sir.

31 Q. Was he the man who had charge of the yard here?

A. He was.

Q. You employed to go to work in the yard?

A. Yes, sir.

Q. At what?

A. Switching.

Q. By the way, you may state what is done in the yard here.

A. Why, trains are handled that come in from the east; freight that's shipped here is made into trains, arranged into trains, to send it over the road, and cars that come in here. Freights that come in are placed at warehouses and freight houses and lumber yards, and so on.

Q. Then trains coming here for this point were distributed in this yard, and trains going out were made up in this yard?

A. Yes, sir.

Q. And you were employed to work on these trains?

A. Yes, sir.

Q. Or in the making up of these cars?

A. Yes, sir.

Q. Was it the same work you had been at the winter before?

A. Yes, sir.

Q. Did you or did you not, this fall on which you were hurt, understand the duties of switchman in the yard?

A. I did.

Q. Who were with you in the yard at that time, and in what capacity were they?

A. Well, Mr. Galvin was acting as yardmaster at the time. There was a man by the name of McLane.

Q. What was he doing?

A. He was brakeman.

Q. Who else?

A. A man by the name of Brant.

Q. What was he doing?

32 A. He was braking.
Q. And who else?
A. That was all of our crew.
Q. By the way, were you night man or day man, or did they have crews for night and day, or only one crew?
A. They ran one crew at night.
Q. And one in the day?
A. Yes, sir; they ran two, daytimes.
Q. Two crews in the day and one at night?
A. Yes, sir.
Q. You were on the night crew?
A. Yes, sir.
Q. Well, is Galvin here, who was, as you say, then yardmaster over you?
A. Yes, sir.
Q. Is McLane here?
A. Yes, sir.
Q. Who was the superior, do you say, of Galvin?
A. Mr. Fulton.
Q. Mr. Fulton?
A. Yes, sir.
Q. Mr. Fulton living in the city yet?
A. Well, he is present; I don't know whether he is—I think he isn't living here.
Q. You think he has moved away; do you know whether he is yet in the employ of the Northern Pacfic Railroad Company?
A. I think he is.
Q. Who was engineer on the engine?
A. Mr. Bassett.
Q. At that time?
A. Yes, sir.
Q. Well, by night or day was he engineer.
33 A. I believe that they changed around; they worked one week nights, and the next week day times.
Q. The engineers did?
A. Yes, sir.
Q. Then he would be engineer for one week in the night and for the next week in the day?
A. Yes, sir.
Q. You had been at work here that time; how long before you were hurt?
A. About two weeks.
Q. That is your best recollection?
A. Yes, sir.
Q. Prior to that time had you ever known anything of Bassett, the engineer?
A. Yes, sir.
Q. Where did you know him?
A. He was firing on the road when I first became acquainted with him.

Q. Well, had you any familiarity as to him, as to what he was?
A. No, sir.
Q. How much were you acquainted with him before you came here that winter?
A. Scarcely any.
Q. Well, just knew him to see him?
A. Yes, sir.
Q. As to his mode of doing business as an engineer, did you know anything about it until you came here that fall?
A. No, sir; I didn't.
Q. That fall you were here two weeks, he being night man one week and day man the other; then you were with him but about one week before you were hurt?
A. I think so.
34 Q. Is he here yet?
A. Yes, sir.
Q. He lives in town?
A. Yes, sir.
Q. Now, about what time of the night were you injured?
A. Well, it was the latter part of the night; I think somewhere—I think about 5 o'clock. I couldn't state the exact hour, but not far from that; it was before daylight.
Q. About what time?
A. Between four or five o'clock.
Q. It wasn't daylight, then?
A. No, sir.
Q. Well, you may go on and state how that accident occurred—what had occurred that night. Go on and state—that night. Before you answer that, who was the engineer of the switch-engine the night you were injured?
A. Mr. Bassett.
Q. Well, now you will please go on and state to the jury, commencing with that night, how you were injured, what occurred up to the time of your injury and at the time of your injury, and how it occurred. I think you will get it better by stating it in your own language.
A. Well, we had been asleep for a short time before that when Mr. Galvin, the yardmaster, was checking up the yard, and he come and woke us up.
Q. Was it or was it not customary to take a short nap in the night at times?
A. It was after we had our work done, and while the yardmaster was looking the yard over. That depended altogether upon how much work we had to do.
Q. Well, go on.
A. We had been sleeping a little while before that. Mr. Galvin called us and we got up, and he started down the track——
Q. Who did?
35 A. Mr. Galvin. He had crossed the street near the watch-house on the crossing; I followed him down there. Mr. Galvin told me to go up and get the switch-engine standing on the

headquarters track, and I went up and spoke to Mr. Bassett and told him we wanted to do some work down in the lower yard, and I stepped on the hind end of the engine then and gave him the signal to back up. He didn't seem to be in a hurry.

Q. Well, let me ask you was it or was it not your duty to give such a signal at that time?

A. It was.

Q. Under those circumstances?

A. Yes, sir.

Q. You say it was according to the rules of the yard?

A. Yes, sir. He didn't seem to be in a hurry. I told him to hurry up, we was in a hurry—we was a little late. I don't know, we got into a kind of dispute—we had a few words. I told him I couldn't help it, I was not running the yard—that he was put there to do what he was told. Then he backed up into the lower yard and coupled on to some cars in "number 3"——

Q. "Number 3," what do you mean by that?

A. The side tracks are numbered numbers 1, 2, and 3 from the main line.

Q. He backed up and coupled on to some cars, you say?

A. Yes, sir.

Q. Who did the coupling?

A. I done the coupling.

Q. Was that your duty?

A. Yes, sir.

Q. He run the engine and you were there to couple and to uncouple and to give signals?

A. Yes, sir; and Mr. Galvin who was just below he cut the cars off.

Q. Explain to the jury what you mean by cutting the cars off.

36 A. Well, pulling the pin and separating the cars.

Q. Leaving as many as you desired to leave there?

A. Yes, sir.

Q. That's what you mean by cutting them off?

A. Yes, sir.

Q. Very well; Galvin cut these off?

A. Yes, sir. He said, Go ahead, "Number 5."

Q. What did that mean?

A. That meant to go ahead and back up on number 5.

Q. That is, on number 5 track?

A. Yes, sir. I gave the signal to go ahead, and we pulled over the switch——

Q. One moment. He pulled over the switch?

A. Yes, sir.

Q. Now, explain what that means, Richard, please.

A. He moved the engine and cars ahead above the switch.

Q. And then by turning that switch you could throw the cars from number 3 track on to number 5?

A. Yes, sir. I threw the switch and gave him the signal to back

up. I then got onto the car—the hind car—and gave him the signal to back up 7 or 8 cars.

Q. Explain to the jury how these signals you have spoken of a number of times are given. Explain the giving of those signals according to the rules, whether those rules are understood by railroad men engaged in the yard.

A. The signal was, then, to back up would be to raise and lower the lantern straight up and down, and then for the cars——

Q. Supposing you wanted to say to him to back—supposing you wanted to indicate to him or give him the signal to back up 7 or 8 cars, what would you do?

A. I would give him the signal to back up——

Q. What would you do?

37 A. I would raise my lantern up and down.

Q. How many times? If you wanted to back 5 cars what would you do?

A. Raise the lantern up and down five times.

Q. Then you raise your lantern up and down the number of times you want him to back car-lengths?

A. Yes, sir.

Q. Was that a well-known signal in the yard?

A. Yes, sir.

Q. When you wanted him to go ahead, what was that?

A. By swinging the lantern over.

Q. When you wanted to give the signal to stop, what was that?

A. Swinging it across the track.

Q. You say you gave him the signal to back 7 or 8 car-lengths, do you remember which?

A. I don't, exactly.

Q. You say it was seven or eight cars?

A. Seven or eight cars.

Q. Go on and state what was done.

A. He backed up about three car-lengths and reversed his engine.

Q. State whether he backed up rapidly or slowly—how was that?

A. Well, we were backing middling fast.

Q. Well, did he reverse the engine rapidly or slowly?

A. He reversed it rapidly.

Q. Well, very rapidly, or how? Indicate to the jury whether it was fast or slow, and the degrees of fastness or slowness, when he had backed up about three cars; you say he backed up middling fast. Now he reversed the engine; did he reverse it rapidly or slowly or middling, how was that?

A. He just threw her over.

Q. What do you mean, that that reverses the wheels—whereas they were turning backward before he caused them to turn forward?

38 A. Yes, sir.

Q. Is that what you mean by throwing her over?

A. Yes, sir.

Q. That is, not only it stopped the wheels from rolling backward, but it actually turned them to rolling forward?

A. Yes, sir.

Q. How rapidly, how quickly, was that motion done—throwing her over, as you say?

A. Well, it was done very quickly.

Q. In doing that is it not true they have a lever here they just move in that way?

A. Yes, sir.

Q. That reverses the steam or turns the wheels revolving the other way?

A. Yes, sir.

Q. Supposing you wanted to stop the wheels or car from rolling backward—wanted to take the steam off that was turning the wheels backward—how would you do?

A. Shut off the steam.

Q. How would you turn the lever?

A. There's a lever there for that purpose.

Q. Turn it how much?

A. Push it clear in.

Q. Then if you wanted to cause the wheels to move the other way what would you do?

A. You would have to move the reverse lever and open the throttle.

Q. Did he do both?

A. No, sir; he didn't.

Q. Explain just what he did, so the jury will understand you.

A. He merely threw the reverse lever over; that gave the cars a very sudden jerk, taking up the slack.

Q. You say he did that—he gave them a very sudden jerk?

39 A. Yes, sir.

Q. Now, explain about taking up the slack—explain so that the jury will understand it.

A. Well, the slack where the cars were coupled together with links and pins—when they are drawn apart and shoved together there is from three to six inches slack—there is that much give between the cars.

Q. Now, then, as he was backing up these cars were pushed together?

A. Yes, sir.

Q. When he would reverse in this way. Explain to the jury what the effect would be—what it would do.

A. Why it would cause a very sudden jerk.

Q. You say by throwing over this lever that he reversed the motion of the wheels of the engine?

A. Yes, sir.

Q. And that gave the cars a very sudden jerk?

A. Yes, sir.

Q. State what effect it had.

A. It threw me off.

Q. Well, was that or was it not a very dangerous thing to do? Was it or was it not a thing that would likely throw any person off from these cars?

A. It was.

Q. Now, go on and explain to the jury where you were during the time you were backing down and when this engine was reversed on track number 5?

A. I was standing on top of a box-car—the hind car.

Q. How many cars had you hitched on to?

A. Three.

Q. Three cars?

A. Yes, sir.

Q. You were throwing them, you say, down 7 or 8 car-
40 lengths on track number 5?

A. Yes, sir.

Q. You were standing on the rear of the car?

A. Yes, sir.

Q. Was it or was it not your duty at that time and place, under those circumstances, to give him the signal of the number of cars to back?

A. Yes, sir.

Q. Was it or was it not your duty at that time to be on that rear car?

A. It was.

Q. Looking backward, as you were backing on the track?

A. Yes, sir.

Q. Were you or were you not at that time at the very place where your duty called you?

A. I were.

Q. Now, according to the rules of that yard, was it or was it not his duty to obey your signals as given to him?

A. It was.

Q. After you gave the signal to back eight cars it was his duty to back that distance before stopping, was it?

A. Yes, sir.

Q. Now, witness, when you had backed, you say, about three cars he gave this sudden reversal of the engine that threw you down onto the track, did it?

A. Yes, sir.

Q. Had you your lantern in your hand at the time?

A. I had.

Q. Did you give any signal to him before that reversal to stop?

A. I did not; no, sir.

Q. Had anybody?

A. No, sir; not that I know of.

Q. Well, who were there, then?

41 A. Mr. McLean.

Q. Mr. McLean?

A. Yes, sir.

Q. What was McLean's duty there?

A. Switchman.

Q. McLean was a switchman?

A. Yes, sir.

Q. Like yourself?

A. Yes, sir.

Q. Where was he during the time you were backing down on track number 5?

A. He stood between the engine and head car, I believe.

Q. Was that the proper place for one of the switchmen to be?

A. It was.

Q. With a view to do what thing?

A. Why, whatever there was to do—cut off the engine from the cars we were moving, or move the switch—whatever there was to do.

Q. Then it was proper for one of the switchmen to be there. You say it was also proper and your duty or the duty of one of the switchmen to be on top of the car?

A. Yes, sir.

Q. The one on top of the car as you were backing would properly be on the rear end of the car?

A. Looking out for cars below.

Q. Cars below?

A. Yes, sir; there were more cars below on the track.

Q. Now, who else was there?

A. Well, that's all that I know of.

Q. Was Galvin around there—the yardmaster?

A. Yes, sir; he was just below us.

Q. Where was he—about how far from you?

A. Well, he was some three or four cars, I should think—

42 not a great ways below.

Q. In the direction in which you were moving?

A. Yes, sir.

Q. Under those circumstances at that time, moving in that manner, whose duty was it to give the signals at that time?

A. It was mine.

Q. Just as you did?

A. Yes, sir.

Q. Now, when this sudden reversing of the engine was done and taking up the slack and jerking the cars as you speak of occurred, you say you were thrown off?

A. Yes, sir.

Q. Permit me to ask you, Dick, whether one of those switch-engines can or cannot very suddenly start one way or other, that way?

A. They can.

Q. Well, can they any more suddenly than an ordinary road-engine?

A. Yes, sir; a good deal quicker.

Q. Then I will ask you whether it was or was not, at that time and under those circumstances, when you had given the signal to back that distance, without any notice to you—whether it was or was not a very dangerous thing for this engineer to reverse his engine?

A. It was.

Q. Was it a little dangerous or very dangerous?

A. It was very dangerous.

Q. Would that or would it not be likely to throw any person from the top of the car?

A. It would.

Q. After he had thus reversed the engine and thrown you off, what was done then?

A. He reversed it back.

Q. How soon did he do that?

A. Right away.

43 Q. How soon do you mean by right away?

A. Almost immediately.

Q. Almost immediately?

A. Yes, sir.

Q. That is, turned it running backward again?

A. Yes, sir.

Q. Go on and tell what occurred.

A. Well, after he reversed the engine ahead it gave the car such a jerk I lost my balance and fell off from the hind car. As I fell I was nearly under the wheels—the car didn't come to a standstill, but it slackened down—nearly stopped them; then he reversed it back, and as he reversed it back they ran over me.

Q. Ran over both legs?

A. Yes, sir.

Q. Go on and tell what occurred then.

A. As the wheels went over me I grabbed hold of my legs and pulled my feet out.

Q. How many wheels ran over you?

A. One.

Q. One wheel ran over both legs?

A. Yes, sir.

Q. Go on and tell what occurred.

A. I laid there until the engine went by me; as the engine went by me I hollered to them, and Mr. Galvin came to me first, I believe; then Mr. McLean and Mr. Brant and Mr. Bassett and the fireman they all came around me, and Mr. Bassett spoke and wanted to know how I got hurt—how I got cut—something to that effect. I made the reply that it was his monkey-work, if he had obeyed my signal it never would have happened.

Q. What did he say?

A. He said I was a damned liar.

Q. What else was said down there?

44 A. Mr. Galvin said that he would tramp him right down through the ground and started for him, and I spoke to Mr. Galvin and asked him—I says, "Never mind, Dan.;" I says, "Straighten out my feet." My feet were loose and swinging—the bones grating. Mr. Galvin took hold of my feet and straightened them out on the ground.

Q. Did you or did you not faint at that time?

A. I did not.

Q. You didn't?

A. No, sir.

Q. Well, Dick, state to the jury, then, if you please, as near as you

can, how your legs were cut—how they were affected—how nearly they were taken off.

A. Well, they were all ground up about the width of a rail.

Q. All ground up?

A. Yes, sir; merely hanging—cords and muscles.

Q. The bones all crushed?

A. Yes, sir; they were crushed so that when my feet were straightened out they would drop right down.

Q. Were they so they could be set, or was it necessary to amputate them?

A. It was necessary to amputate them.

Q. Well, you say it was necessary to amputate them?

A. Yes, sir.

Q. Were they amputated?

A. They were.

Q. You may state whether you were or were not hurt in any other way.

A. Well, I think that I was.

Q. Well, go on and state what your reason is for thinking so.

A. Well, after they had carried me upstairs to the hotel I had a terrible cramp in my stomach. I asked the doctor—Dr. Darrow—if he couldn't give me something to stop that, and he sent after some brandy. He gave me some brandy and that seemed to relieve me in a few minutes.

Q. Has or has not any difficulty which then occurred, which you didn't know of before, followed you since? If there has, state what it is.

A. It has.

Q. State the effect—its manifestations.

A. Well, by spells, I have pains through my chest.

Q. Well, how great or how little?

A. Well, enough so that I have to lie down.

Q. You say you have that by spells. Dick, how often do those spells occur?

A. Well, sometimes they don't occur more than once or twice a week, sometimes oftener.

Q. Well, is that about the length of time they occur, once or twice a week or oftener?

A. Yes, sir.

Q. Has that or has it not been the case since you were hurt?

A. Yes, sir.

Q. Did you ever have any such feeling as that before?

A. I did not.

Q. Does that continue up to this day?

A. It does.

Q. Well, what effect does it have on you—you say you have to lay down?

A. Yes, sir; it makes me very weak and sick to my stomach.

Q. Can't sit up at all when it occurs?

A. Oh, I never have been so bad but what I could have sit up, if

it was really necessary—if I had to—where I couldn't have lain down; it is so that I am not fit to be up at times.

Q. Well, Dick, go on and state if there is anything else the result of this, except the taking off of your legs and the pains which you say come on as often as you speak of—anything else that's the effect of that or not?

46 A. Well, I don't know as there is only my strength. I have never regained my strength again.

Q. You never have?

A. No, sir.

Q. Have you regained anything like your former strength?

A. No, sir.

Q. Were you or were you not a man of strength before?

A. I were; yes, sir.

Q. Well, were you a man of great strength or little strength?

A. Well, I was naturally a strong man of my build and size.

Q. And I think you have stated before that you were invariably healthy up until that time?

A. Yes, sir.

Q. Now, Dick, you have gotten a kind of wooden legs?

A. Yes, sir.

Q. State how far below the knee are your legs amputated.

A. About six inches.

Q. Each about the same distance?

A. Yes, sir; one is a trifle longer than the other.

Q. How long ago did you get those wooden legs?

A. I got them last July.

Q. You had them on since you came here this time?

A. Yes, sir,

Q. Did you or did you not use them just as long as you could stand it?

A. I did.

Q. Now, state to the jury about how long you can use them—how far you can walk with them without growing so that you have to take them off—hurt you.

A. Well, I can—after I am rested up—get my stumps in good shape—I can put them on and walk from half to three-quarters of a mile.

Q. After you have got rested up and got your stumps in

47 good shape?

A. Yes, sir.

Q. Then, after you have walked, Dick, half or three-quarters of a mile, what is the effect?

A. Well, the stumps become tender again; they become uncomfortable, and I have to take them off then.

Q. Now, when you talk about walking with your legs, do you have to use anything to assist you to walk then?

A. Yes, sir.

Q. You can't walk with them alone?

A. Well, not very well—not to make any headway. I can't balance myself without a cane.

Q. You state that for two years before this occurred you were a farmer?

A. Yes, sir.

Q. Is there any work on the farm now that you can do since this occurrence? And, if so, state what, if you please, and how much. Just go on and explain that to the jury.

A. Well, there isn't anything that I can make a man at.

Q. Well, is there anything that you can do for any length of time with any degree of efficiency? If so, tell the jury just what.

A. Well, I could sit on the binder and drive binder, or I could drive a sulkey plow.

Q. After you got on there?

A. After I got on there.

Q. Could you tend to your team?

A. No, sir.

Q. If a person hitched up the team for you and got you onto the binder or sulky you could drive it?

A. Yes, sir.

Q. What else can you do, Dick?

A. Well, I don't know. I made a little garden on my
48 knees last spring.

Q. Well, can you go around and do something on your knees?

A. A very little.

Q. Well, that can be done by a man on his knees—you can do better that way than you can any other way, can't you?

A. Yes, sir; some kind of work.

Q. Anything that can be done by a person on his knees?

A. Yes, sir.

Q. You can do a good deal better; when you are standing on those wooden pegs or legs that you have you are not steady or able to balance yourself?

A. No, sir; not very well—that is, any slight push would throw me off my balance.

Q. Now, prior to the time of this accident, you may please state to the jury whether you had earned and paid for, by your own labor, this farm and the improvements on this farm and the stock which you had there acquired.

A. I had; yes, sir.

Q. Now, is there anything else that you can do on that farm except what you have explained to the jury? If so, explain it, every word, now; we want the best and the worst of this.

A. The farm wasn't—at the time I was hurt it wasn't all paid for.

Q. How much was back on it, Dick?

A. There was about $300, I believe.

Q. Well, had all this property and the improvements, the purchase-money of the farm and stock, all been paid for but that at that time?

A. Yes, sir; I had the money in my pocket to pay that mortgage the time I was hurt.

Q. Then, in fact, you had earned enough at that time to have paid up everything and had it clear?

A. Yes, sir.

49 Q. You were railroading here then only incidentally during the winter time when you couldn't work on your farm?

A. Yes, sir.

Q. Came in to make something so as to assist you on your farm the next year?

A. Yes, sir.

Q. Was it your purpose to follow railroading at all except during such time for the purpose of making something when farming could not be conducted?

A. No, sir.

Q. You have stated, I think, to the jury where that farm is?

A. I believe so.

Q. Did you state how large a farm that is, Dick?

A. I believe so—a quarter-section.

Q. You were not married when you were hurt, nor are you now?

A. No, sir.

Q. How long was it before your legs healed up, Dick?

A. Well, one of them healed up in—I think it was inside of two months after it was taken off; the other one healed up in about something over three months, but it broke out again and it didn't heal up then until the next July.

Q. Are they both healed now?

A. They are.

Q. Do you know how long you were confined to your bed?

A. Yes, sir.

Q. How long?

A. About three weeks—a little more than that—probably about a month nearly before I was able to sit up any.

Q. You were taken from here to what place, and how soon?

A. To Brainerd.

Q. How soon were you taken there?

A. About three weeks, I think.

50 Q. After you were hurt?

A. Yes, sir.

Q. How long did you remain at Brainerd?

A. In the neighborhood of a week.

Q. Your mother and sister then came for you and took you home?

A. Yes, sir; my mother went to Brainerd and staid with me; my father and sister came up; father and sister went back again before I was taken from Fargo to Brainerd and mother remained with me.

Q. And took you home after the time you speak of—after you remained at Brainerd about a week?

A. Yes, sir.

Q. Your father and his family live in Winona county, or do they?

A. Yes, sir; they do.

Q. In the State of Minnesota?

A. Yes, sir.

Q. In your opinion, Dick, how much could you have earned on your farm—conducting your farm—in case you hadn't been injured?

A. Well, I could have made a pretty good salary, at least a hundred dollars a month.

Q. Well, do you or don't you think you could have made more than that, had your health been unimpared, with your natural vigor?

A. Well, I think I could have made that anyway; of course, the winter time there was but very little to do on the farm without stock.

Q. Well, I understand there is very little to do without stock; you haven't yet gotten any stock. Now, you are speaking of the first year, but after you had gone on and acquired stock, got your farm in shape as you were getting it, what, in your judgment, could you have earned?

A. Well, I think a man could have cleared, anyway, a hundred dollars a month; possibly more or less.

Q. You said you had how much broken at that time?

51 A. One hundred acres, about.

Q. On your quarter-section?

A. Yes, sir.

Q. What else had you gotten during the time?

A. I had four horses.

Q. What else had you by way of agricultural implements?

A. Three or four plows.

Q. Well, what else?

A. A couple set of harrows.

Q. What else?

A. A couple of wagons.

Q. Well, what else?

A. A seeder.

Q. What else?

A. A binder.

Q. And you say you either had paid off or had the money then in your pocket, all of which you had earned yourself, to pay for all these things?

A. Yes, sir.

Q. The farm and all of those improvements and all those implements and teams.? Now, I will ask you a question which I wish you to answer. Had your habits been or had they not been invariably good up to that date?

A. They had — good, I think.

Q. Well, had there ever been an exceptions to it, Dick. This is not a question of modesty; it's a question of stating the facts.

A. No, sir; I think not.

Q. And your health invariably good?

A. Yes, sir

Q. You may state what wages you were getting that winter from the railroad company.

A. Fifty dollars a month.

52 (Cross-examination by W. P. CLOUGH:)

Q. You were hurt in the fall of 1881, Mr. Mares?

A. I believe so; yes.

Q. And you say the winter previous to that you had worked for the same company?

A. Yes, sir.

Q. Where?

A. In the Fargo yard.

Q. Where did you hire out the previous winter?

A. I hired out in Fargo.

Q. When?

A. In the fall.

Q. What time?

A. Well, I don't remember just the time; it was somewheres—I think it was in November.

Q. That would be November, 1880?

A. Yes, sir.

Q. Who hired you?

A. Mr. Fulton.

Q. In November of 1880?

A. Yes, sir.

Q. And he also hired you in November, 1881?

A. Yes, sir.

Q. How long did you work in the yard in 1880?

A. I worked until some time in March, I think.

Q. March of 1881?

A. Yes, sir.

Q. Who discharged you?

A. Mr. Fulton.

Q. What for?

A. For breaking some coaches.

Q. For breaking some coaches?

53 A. Helping to break them.

Q. And so you went away and came back again the next fall?

A. Yes, sir.

Q. And hired out again?

A. Well, I didn't go immediately away.

Q. But you went away from the employment of the company?

A. As soon as I could get away—as soon as I could get through with my stock—I went. I had stock in the barn at the time.

Q. But you went away from the employment of the company—went out of the employment of the company—and then came back again and hired out again the next fall?

A. Yes, sir.

Q. Had your duties in the yard in 1880 been the same as those in 1881?

A. Similar; yes, sir.

Q. You had been brakeman in the yard?

A. Yes, sir.

Q. When you went back, in 1881, what engineers did you work with?

A. I worked with a man by the name of McLean, I think. I think there was a man by the name of McLean—George McLean, I think, was running.

(By Judge WILSON:)

Q. That's the time you were hurt; Mr. Clough is asking you about the time you were hurt at last.

A. He asked me what engineers, did he not?

Q. Yes, sir; what engineers you worked with.

A. I think there was Mr. McLean and Mr. Bassett, if I remember rightly.

Q. You belonged, you say, with the night crew?

A. Yes, sir.

Q. What did a crew consist of in the yard at that time—what men?

A. At that time it consisted of a yardmaster and three men.

54 Q. Did the same engine work with the same crew at all times?

A. It did not.

Q. You were at work in this yard, you say, about two weeks before you were hurt?

A. Yes, sir.

Q. Now, what part of those two weeks did you work with Arthur Bassett as engineer?

A. Well, I can't remember now.

Q. How many times were you out with him that fall? Give an idea about how many nights you were out with him that fall, or days at work in the yard with him.

A. Well, I could not; I think I staid one week with him.

Q. Steadily?

A. Yes, sir; I don't know whether he had just changed into the night yard that night; I don't remember whether that was his first night in the yard that night that week or whether he had been on the week before.

Q. But you had worked with him one whole week during the fall of 1881?

A. Yes, sir.

Q. Now, coming down to the time you were hurt, I don't know that I was able to comprehend the situation fully, and I do not think the jury was. Where were the cars that you went after when you went and got Mr. Bassett and his engine—where were they situated?

A. They were on the side track known as number three, in the lower yard.

Q. Which was the lower yard—the one between Broadway and the river?

A. Yes, sir.

Q. How far below Broadway were those cars?

A. Well, I don't know.

Q. About how far?

55 A. Well, maybe between 20 and 40 rods.

Q. Between 20 and 40 rods below Broadway?

A. Yes, sir.

Q. When you went after Bassett to get him with his engine, where was his engine?

A. On the Headquarters track, I believe.

Q. On the hotel track?

A. Yes, sir.

Q. About how far up?

A. It stood in just enough to clear nicely, I believe.

Q. Then that would be just a little west of Broadway?

A. Yes, sir.

Q. The cars you wanted to handle stood about 40 rods east of Broadway, and the engine you went after stood a little bit west of Broadway; that was the case, was it?

A. Yes, sir.

Q. Which way was the engine headed when you went after her, was it east or west?

A. It was headed west.

Q. Which end did you get on?

A. I got on the hind end.

Q. That would be the end towards the east?

A. Yes, sir.

Q. Then when the engine went down to pull out these cars she backed, did she?

A. Yes, sir.

Q. Which end of the cars did she hitch onto, the east end or west end of the cars, as they stood there?

A. The west end.

Q. She hitched onto the west end of the cars?

A. Yes, sir.

Q. And you say Mr. Galvin was down there to cut off?

56 A. Yes, sir.

Q. Now, on this occasion when you were hurt, had you picked out any cars or was this the first time you had hitched on?

A. That was the first time.

Q. Where were you when you had been asleep?

A. In the office.

Q. How long had you been asleep?

A. Well, not a great while.

Q. About how long?

A. Well, I couldn't state as to the exact time.

Q. Couldn't give any idea about how long you had been asleep?

A. Yes; I can give some idea.

Q. Give us a general idea, if you please, how long you had been asleep. There is no catch in this.

A. Well, I think about half an hour.

Q. Where was that office—in the Headquarters Hotel?

A. No, sir.

Q. It was the superintendent's office, was it?

A. No, sir.

Q. Which one do you mean?
A. I mean the office that was used by the brakemen.
Q. Where was that?
A. Where the way-bills was kept. The conductors called there, I believe, the conductors' room.
Q. Where was that?
A. In a building west of the Headquarters.
Q. In a little building west of the Headquarters, where the superintendent has his office—in the same building?
A. Yes, sir.
Q. Express office is in it also?
A. Yes, sir.
Q. Just a few feet west of the Headquarters Hotel this office
57 is, is it?
A. Yes, sir.
Q. Now, who do you say came and woke you up that morning?
A. Mr. Galvin.
Q. Mr. Galvin came to arouse you?
A. Yes, sir.
Q. Which of the yard force were asleep in the office at that time, belonging to the gang?
A. Well, I think we all were; I don't remember.
Q. Was Mr. Bassett asleep?
A. I don't know whether Mr. Bassett was asleep or not. I think he was or had been.
Q. Was he in there or was he on his engine?
A. He was on his engine.
Q. He wasn't asleep in the office—he was down on his engine?
A. Yes, sir.
Q. Was the morning pretty dark?
A. I don't know that it was unusually dark; still it wasn't very light.
Q. You had your lanterns lighted?
A. Yes, sir.
Q. How far could you see from you with your lantern's light—clearly?
A. Well, you couldn't see very far with a lantern.
Q. About how far?
A. Well, you couldn't see much of any distance. A lantern won't help a man to see at all—that is, with the exception of a very few feet.
Q. Ten feet or 15?
A. Oh yes, probably 20 or 30 feet.
Q. Now when you were aroused out of your sleep, where did you go next?
A. I walked down with Mr. Galvin across Broadway.
58 Q. How far did you go?
A. I went just below the flag-house or to the flag-house near the switch.
Q. That would be about the east side of Broadway?
A. Yes, sir.

Q. How far were you this side of the cars that you finally took hold of?

A. Well, I don't know just how far it was; it was probably between—oh, it might have been ten or fifteen rods, something like that.

Q. Well, how far were you east of the engine?

A. Probably four or five rods at the time.

Q. Compared with the length of this room, how far east of the engine did you go before turning back?

A. Well, the street, I suppose is about four rods wide there.

Q. So that you turned back and went about four or five rods?

A. Yes, sir.

Q. Now, when you got back there, did you go up into the cab, or where did you go to speak to Mr. Bassett?

A. I stood on the platform up by the side of the cab.

Q. That is the platform of the hotel?

A. Yes, sir.

Q. You saw him, did you?

A. Yes, sir.

Q. Was he awake?

A. He laid there on his seat.

Q. Asleep, wasn't he?

A. Well, I don't know whether he was asleep or not.

Q. The rest of you men had been asleep laying in the shed there, or office?

A. Well, I had; I don't know whether the rest of them had or not.

Q. Didn't you find Mr. Bassett asleep when you went to go and speak to him to pick up the cars?

59 A. I don't know whether he was asleep or not. He was resting there; whether he was asleep or not I ain't certain, he answered me when I spoke to him.

Q. He had been at work all night, hadn't he, like the rest of you?

A. Yes, sir.

Q. What did you say to him?

A. I told him we had some work to do.

Q. What did he say?

A. He wanted to know what we were going to do.

Q. Still laying there, was he?

A. Yes, sir; he raised up—was sitting on the seat then.

Q. What was said then?

A. He wanted to know what we were going to do. I told him I didn't know and we got into a dispute then. I don't remember the exact words.

Q. I would like to know what the dispute consisted of—what did he say and what did you say?

A. The sum and substance of the dispute was I wanted him to back up and he didn't seem in any hurry.

Q. He was sleepy—wasn't awake when you first went there, was he?

A. I don't know; he was talking back, he must have been.

Q. Hadn't he been at work all night and wasn't he drowsy and

sleepy and not fully awake when you went there. Wasn't that the fact—don't you know that to be so?

A. No, sir; I do not. At the time of the dispute I think he was fully awake.

Q. What was said in this dispute?

A. Well, he didn't offer to back up the engine. I spoke to him and told him I was in a hurry. I don't remember just what he said then. I says, "Well, damn it," I says, "I can't help it; I am not running the yard." I says "I have got my orders, and"——

Q. You said you had your orders and—what?

60 A. He was put there to do what he was told.

Q. He wasn't finding any fault with you personally, was he, in this so-called dispute? He didn't make any personal objection to you of any kind, did he?

A. I think not; no, sir.

Q. What he demurred to was the nature of the order given, wasn't it? Did he make some objection to the nature of the order that was given—why he refused to obey the order that was given—claimed it was an improper order, didn't he, or what?

A. Well, he didn't say whether it was or not.

Q. What did he say in respect to refusing to obey it?

A. Well, he said that he was running that engine.

Q. Well, that was the fact, wasn't it?

A. Yes, sir.

Q. But he did start up, didn't he, and go in the direction you wanted him to?

A. He did after a while; yes, sir.

Q. About how long a while was that?

A. Well, it was some little time; perhaps four or five minutes after I first spoke to him.

Q. Not to exceed four or five minutes, was it?

A. No, sir.

Q. You got on the foot-board on the rear end of the engine?

A. Yes, sir.

Q. And he backed down?

A. Yes, sir.

Q. Who let him onto the track where the cars were, did you, or was that switch open?

A. That was open.

Q. It was connected with the hotel track?

A. Yes, sir.

Q. You had to go down that switch about four or five rods

61 before hitching onto the cars?

A. I don't know the exact distance; it's something pretty hard to tell.

Q. It was a short distance, was it? About how many car-lengths would it be?

A. A man at work in the yard that way, when walking down the yard that way, he wouldn't notice how many car-lengths.

Q. Was Mr. Galvin there when you went down?

A. Yes, sir.

Q. Standing still, was he, waiting for you, or did he walk down?
A. He walked down.
Q. Did he stay until the engine started and walk down with you, or was he there when you got there?
A. He was there when we got there—he walked on.
Q. You turned back when he directed you to get the engine, and he walked on, so he got there ahead of you?
A. Yes, sir.
Q. How many cars were standing there hitched together when you got down there on that track?
A. I couldn't tell you.
Q. Give something of an idea; were there ten, or fifteen, or twenty, or how many?
A. I don't remember. I think there were quite a number of cars there though.
Q. When you got down there you were riding on the foot-board on the rear of the engine—you were riding on the foot-board—you got off and saw Mr. Galvin, did you?
A. Yes, sir.
Q. Was the other brakeman there?
A. Yes, sir.
Q. What was his name?
A. McLean.
62 Q. Did Mr. Galvin tell you how many cars were to be cut off?
A. No, sir.
Q. Did you cut off the cars yourself?
A. No, sir.
Q. Did he tell you what car to mount—to get on?
A. He did not.
Q. Did he motion to you?
A. He did not.
Q. Did you get on any car?
A. I did.
Q. What particular car did you get on—that is, with reference to those that were finally cut off?
A. Well, I don't remember the number of it.
Q. I didn't speak of the number of the cars, but was it the last car towards the other cars or this way from them?
A. It was the last car.
Q. How did you know which car to get onto. How did you come to get onto that particular car any more than any other?
A. Well, the reason I got onto that car was that was where I wanted to be to watch the track below me.
Q. How many cars was that from where the engine hitched on—which car was it?
A. It was the hind car, the third car from the engine.
Q. How many cars were cut off?
A. Three.
Q. It just happened so, did it, that the car you had got on was cut off, or were you directed to get onto that particular car?
A. Those cars was cut off before they was ever started.

Q. That is all true; but had they been cut off by Mr. Galvin at that time, or had that been cut off when you hitched onto it with the engine?

A. Well, I couldn't say as to that.

63 Q. After you got onto the car, who gave the order in regard to the shifting of these cars?

A. Mr. Galvin.

Q. Will you please state now—I don't know but you have given it on your direct examination—just what that order was; what did he say?

A. "Go ahead to No. 5."

Q. But didn't say the number of cars to take to "number 5?"

A. No, sir.

Q. Nothing said about that; you happened to get onto the car that was the hind of the three?

A. Yes, sir.

Q. Now, the car you got on was the car furtherest east?

A. Yes, sir.

Q. As, for instance, to illustrate, here are three cars; the engine comes up here and hitches onto this car, and you got onto this car.

A. Yes, sir.

Q. And that car was uncoupled?

A. Yes, sir.

Q. Now, whereabouts did you get onto that hind car; which end of the car did you get on—this end or that end?

A. I got on below the switch.

Q. I mean on which end of the car; you climbed up the ladder, didn't you?

A. Yes, sir.

Q. Was it the ladder next to the engine, or the other way, that you climbed onto?

A. Next to the engine.

Q. Then you got on the rear end of the car?

A. Yes, sir.

Q. Where did you take your station?

A. I walked to the opposite end of the car.

Q. You went over here?

64 A. Yes, sir.

Q. Went over and stood in front?

A. Yes, sir.

Q. Up against the brake-staff?

A. No, sir; I was standing on the run-board.

Q. How far from the end of the car were you?

A. I should judge about three feet.

Q. You gave the signal to back up; how did you know what number of length of cars to give the signal for backing?

A. I didn't know the exact number of cars; I knew there was that much room.

Q. In order to get on track 5, how far did you have to go; these tracks were running parallel with each other, weru't they?

A. Yes, sir.

Q. Three and four and five were running parallel to each other, were they?

A. Yes, sir.

Q. Were the switches on these different tracks that connected them with the main line, were they together there or how; were they put abreast of each other?

A. No, sir; they are different switches.

Q. Now, for instance, the switch that was on track 5, that connected with the main track, did it?

A. No, sir.

Q. What did it connect with?

A. Four.

Q. What did four connect with?

A. Three.

Q. What did three connect with?

A. Two.

Q. And so on until you got up to the main track?

A. Yes, sir.

65 Q. The first side track only being connected with the main track?

A. Yes, sir.

Q. Now you may state what motions were necessary to take these three cars out of three and set them into five.

A. It was necessary to couple onto them and pull them over the switch and back down.

Q. Pull them over what switch?

A. Pull them over the switch on the main line—not on the main line, but over the switch on number three.

Q. You had to pull them past the switch on number three?

A. Yes, sir.

Q. In other words, you had to run up towards the main line?

A. Yes, sir.

Q. And past the switch?

A. Yes, sir.

Q. Then you had to turn that, connecting by that switch, and go back again, did you?

A. Yes, sir.

Q. So that you had to pull it up and then go back again?

A. Yes, sir.

Q. In order to do this work it was necessary to change the motion of the engine and car, wasn't it?

A. Yes, sir.

Q. You couldn't get it out of three and get it back onto five unless the cars were held up and the engine reversed and then set down again; it couldn't have been got out in any other way?

A. No, sir.

Q. Now, after you got on this car you say you stood on the running board about the middle of the car, as I understand you.

A. No, sir.

Q. Where did you stand?

A. I stood near the east end.

66 Q. How far from it?

A. About three feet.

Q. Which way were you looking after you got up?

A. After I first got up?

Q. Yes, sir.

A. I was looking towards the engine when I first got up.

Q. In other words, the end of the car was back here, you were almost to the end, and you were looking this way?

A. No, sir; I said I got up on the west end of the car first. I first got on the car and then gave my signal to the engineer to back up 7 or 8 cars, stepped to the east end of the car and was looking east, then watching the track below me.

Q. When you got up, where did you stand when you gave the signal?

A. I stood on the west end of the car.

Q. And there were two cars then—two freight cars—then between you and the engine?

A. Yes, sir.

Q. Was there an unobstructed view of you from where you stood in the cab; in other words, could the engineer look over these two freight cars and have an unobstructed view of you on the top?

A. Yes, sir.

Q. He could see you on the top, could he?

A. Yes, sir.

Q. When you first gave the signal to back, was it obeyed immediately?

(Objected and withdrawn.)

Q. Did they go ahead after they were coupled?

A. Certainly.

Q. How far?

A. I told you three or four times—pulled over the switch.

Q. I mean going west; when I speak of going backward

67 I mean going west.

A. As I said before, we coupled onto the cars on number three, pulled them west towards the main track over the switch and backed them east onto number five.

Q. In order to transfer the cars from three to five it was necessary to pick them up and go west first, wasn't it, pass the switch and then to turn and back east, in order to set them in; that was correct, wasn't it?

A. Yes, sir.

Q. In other words, two motions were necessary—a forward motion and a backward motion—in order to put these cars where they belonged?

A. Yes, sir.

Q. Now, you got up on the car and you gave the signal to the engineer with your lantern to go ahead—that is, to go west?

A. Yes, sir.

Q. Now, when you first gave your signal to go ahead, to go west, how did you say you did it?

A. Just gave him the signal, like that, with the lantern. I give him the signal to go ahead.

Q. Well, did you give any other signal than just to go ahead?

A. No, sir.

Q. Now, was that signal seen the first thing?

A. I think it was.

Q. And obeyed immediately?

A. I think it was; yes, sir, at that time.

Q. He started up and went ahead, and went west; did he pull over the switch?

A. He did.

Q. He went over the switch?

A. Yes, sir.

Q. Now, after he had gone over the switch, had gone west, and had gone onto Broadway, had he, or pretty near?

A. Well, up that way. I don't know whether he was onto
68 Broadway or the crossing.

Q. Then, did you give another signal?

A. I did.

Q. Where were you standing at the time you gave the second signal?

A. Standing on the ground.

Q. On the ground when you gave the second signal?

A. I hadn't been up yet.

Q. Well, then I misunderstood you entirely. Now, let's commence this over again.

A. Very well.

Q. I want to know when you got on this car here; was it when you went down and caught on, or was it after you had caught on and pulled by the switch?

A. After we had coupled up and pulled over the switch.

Q. Then you got on the car.

A. I got on the car as they was coupled up and pulled over the switch.

Q. That is, pulled west until you pulled past the switch?

A. And I stepped off the switch and gave him the signal to stop, then I gave him the signal to back up, and while he was backing up I got onto the end of the car. After I got up onto the car—he was backing up then—after I got up onto the car I gave him the signal to back up 7 or 8 cars.

Q. That's just what I want to get at again. I want to know just how that signal was given and where you were when you gave it?

A. I have told you.

Q. Now, after you had got by the switch, you say you gave the signal to back, then you got on the car—you climbed up on the west end of the last car—the west end of the east car, did you?

A. Yes, sir.

Q. Now, where were you on the top of that last car when
69 you gave the signal to back? or eight cars?

A. I was near the west end.

Q. You was near the west of it?

A. Yes, sir.

Q. Was there anything that was done by the engineer there that indicated that he saw the second signal at all, to back 7 or 8 lengths. You say you gave him one signal to back when you were on the ground; that was not to back any particular distance, was it?

A. No, sir.

Q. Then after he had commenced to back, while the cars were in motion going east, you climbed up on the top of this car?

A. Yes, sir.

Q. Then while the cars were backing, in accordance with your first signal, you gave the second signal to back 7 or 8 lengths?

A. Yes, sir.

Q. Was there anything to indicate that the engineer had seen that second signal which you gave him?

A. Why nothing, any more than that I could see the engine there.

Q. Was there anything to indicate that the engineer saw the signal to back 7 or 8 car-lengths?

A. Yes, sir.

Q. What was that?

A. Everything was to indicate it. He was watching for signals, and my being in plain sight of him where he could take signals.

Q. Where was he standing or sitting?

A. In the cab.

Q. Standing or sitting in the cab? In his seat on the side, was he?

A. Yes, sir.

Q. Was he looking backward all the time?

A. Yes, sir.

Q. Wasn't it necessary for him part of the time to be attending to his engine, so that he had to look in front?

70 A. No, sir; I don't think it was. Of course I am not an engineer—don't know just how much——

Q. Don't you know, as a fact, that in a process of running an engine the attention of an engineer is required a large portion of his time to the front or boiler, and that he cannot look back but a small portion of the time?

A. No, sir; I don't know that.

Q. You say you are not an engineer, and don't know whether it is *not* so or not?

A. Yes, sir.

Q. You cannot say he saw that signal to back 7 or 8 car-lengths, can you?

A. No, sir; I couldn't say that.

Q. Did you repeat the signal to back 7 or 8 car-lengths?

A. I did not.

Q. You say after he had got a certain distance he reversed his engine?

A. Yes, sir.

Q. Were there cars on the track below where you were going?

A. Yes, sir.
Q. You were on number five?
A. Yes, sir.
Q. There was a considerable number of cars on five?
A. Yes, sir.
Q. These three cars attached to that engine were being shoved right towards these other cars standing there, weren't they?
A. Yes, sir.
Q. How far off were these other cars standing still on that track when he first reversed his engine?
A. I don't know.
Q. A short distance, was it not?
A. Not very short.
71 Q. Wasn't it necessary to check the speed of those three cars that were going there in order to prevent a collision with the other cars standing on the track?
A. No, sir; not at that time.
Q. Why wasn't it?
A. It was time enough after he had received a signal to check the speed of those cars. He had been given a signal to back up, and it was his duty to back up until he had received a signal contrary to that.
Q. Wasn't he in plain sight of those cars, so that he could see those cars?
A. No, sir; he couldn't.
Q. Didn't he know those cars were there—know that he had to provide for them and not run into them?
A. I don't know whether he knew those cars were there. He must have known that there was other cars on that track.
Q. How do you know that he reversed his engine at all?
A. I know by the sound and the jerk of the train.
Q. In the process of switching in railroad yards haven't you seen engines reversed frequently?
A. Yes, sir.
Q. That's a common practice, isn't it?
A. Yes, sir.
Q. That's the way they stop, isn't it? Can they do their work without that?
A. Certainly they have to reverse the engine to go different ways.
Q. And in order to check the train and prevent a collision. In yards where cars are being handled promptly isn't that a common practice to check the speed of the engine that is moving the cars by reversing the engine?
A. Yes, sir.
Q. When you were on top of this car that was precisely what you were to expect, wasn't it?
72 A. No, sir; not at that time.
Q. Whenever he intended to stop the speed of these cars he would reverse his engine to do it?
A. Yes, sir.

Q. You had worked enough about railroad yards to know that, hadn't you?

A. Yes, sir; but not in the manner it was reversed at the time.

Q. Now, just where were you standing at the time that engine was reversed the first time?

A. I was standing on the box-car.

Q. Whereabouts on the top of the car; were you still on the running-board?

A. Yes, sir.

Q. At the time the engine was reversed?

A. Yes, sir.

Q. Now, as soon as the engine was reversed did you fall off?

A. Yes, sir.

Q. At once?

A. Yes, sir.

Q. Did the reversal of that engine stop those cars at all?

A. It didn't stop them to a dead stop; they kept going right on.

Q. The reversal of the engine didn't change the direction in which the cars were running at all. You say after he reversed the engine the reversal of the engine and sudden stop of the cars gave them a terrible jerk; they didn't go backward when he reversed the engine, did they—they didn't start ahead?

A. The direction wasn't changed at all. The motion with a switch-engine, reversing the engine that way, *it* takes some little time before it can check the speed or the train sufficiently to start it ahead.

Q. That is the reason why, in switching cars in the yard, it is necessary to check the engine by reversing it; it is because it will do it promptly, isn't it? In other words, the only effect of re-
73 versing an engine would be the same as if the brakes had been put on powerfully?

A. No, sir.

Q. It didn't change the direction of the cars at all, did it?

A. No; it didn't really change the direction of the cars, but it slowed them up—slowed them up pretty fast.

Q. Now, when the slowing process first took place—the checking of the speed of these cars—did you fall down?

A. I fell as soon as the jerk was given the cars.

Q. Just as soon as the jerk was given to the cars you fell right down?

A. Yes, sir.

Q. You had your lantern in your hand, did you?

A. Yes, sir.

Q. You fell on the roof, did you, and rolled over, or how? Did you strike on the roof of the car and roll off, or how?

A. No, sir. Well, I kind of partly caught with one hand on the edge of the car.

Q. And you were standing on the running-board, you say?

A. I fell right over the end.

Q. You fell right over the end of the car?

A. Yes, sir.

Q. Didn't fall off the side?

A. No, sir.

Q. You were standing so near that when the speed was checked you went right on?

A. That's what I mean to say; yes, sir.

Q. You fell right off, but you fell at one side more than in the middle of the track, did you?

A. Yes, sir.

Q. Which wheel of the car was it that ran over you—the set of trucks ahead or the second set of trucks, the one next to the engine?

A. Why, it was the head wheel.

74 Q. The head wheel—that is, the head wheel as you were going?

A. That is the head wheel on the cars the way they were going.

Q. That wheel ran over your legs and you pulled your legs out?

A. Yes, sir.

Q. Now I understand you to say after you fell you did not faint?

A. No, sir.

Q. Some persons came there?

A. Yes, sir.

Q. What was done with you then, do you remember?

A. Yes, sir.

Q. What was done?

A. I was picked up and placed onto the head of the switch-engine.

Q. And carried to the hotel, weren't you?

A. Yes, sir.

Q. Carried in the house, weren't you?

A. I was after a time.

Q. Did you faint at all?

A. No, sir; I did not.

Q. Retained your consciousness all the way, did you?

A. I did until they went to work at me.

Q. Give you anesthetics?

A. Yes, sir.

Q. Except when you were under the influence of anesthetics you had your consciousness all the while, did you?

A. Well, sir, I can't say that I did. No, sir; not all the while. I was conscious up to the time that they commenced the operation on me, but after that, by spells, the medicine affected me more or less, and there was times that I got kind of muddled up a little.

Q. Now, you spoke of a conversation you had with Bassett?

A. Yes, sir.

Q. As to how you got hurt—did you have any other con-

75 versation with him as to how you got hurt?

A. I did not.

Q. Did you have a conversation with him in which you told him you took back what you said about his being to blame—that you stepped off yourself—you thought you were nearer the middle of the car, but as a matter of fact you had got near the end and stepped off?

A. I did not.

Q. You didn't have any such conversation?

A. No, sir.
Q. Did you have a similar conversation with Mr. Fulton?
A. No, sir.
Q. Didn't tell Mr. Fulton so?
A. No, sir.
Q. You know Mr. Trimball, Mr. Hobert's clerk, don't you?
A. I don't think that I do; no, sir.
Q. You didn't have any conversation with him to the same effect—that you were near the end; you thought you were near the middle, but as a matter of fact you were near the end and stepped off the end of the car?
A. Not to my recollection; no, sir.
Q. You won't swear you didn't have such a conversation?
A. When and where?
Q. While you were at the hotel.
A. At what time? I would like to have you specify?
Q. How long were you here at the hotel?
A. I was here about three weeks.
Q. What surgeon amputated your limbs?
A. Dr. Darrow, I believe.
Q. While you were here at the hotel didn't you have a conversation with all these three gentlemen in which you made the same statement, and also to Mr. Hobart, the superintendent, that no one but yourself was to blame?
76 A. No, sir; I didn't tell no one that.
Q. You didn't tell any of those gentlemen no one but yourself was to blame; you thought you was near the middle of the car when you was near the end and stepped off?
A. No, sir; I didn't tell anybody that.
Q. Not anything of that kind?
A. No, sir.

(Redirect examination by Judge WILSON:)

Q. Did you ever tell any one any such thing while you were conscious—any such thing as this that has been asked you — nobody to blame but yourself; you thought you were near the middle of the car, but was near the end and stepped off.
A. No, sir.
Q. Never told anybody any such thing at any time?
A. No, sir.
Q. The counsel first commences by asking you if you were at work on this road in 1880 and afterwards in 1881, and you stated that you were, did you not?
A. I believe I did; yes, sir.
Q. You worked here all the winter of 1880–'81, did you not, in this yard as brakeman?
A. Yes, sir; as I stated, I commenced, I think, some time in November and quit in March.
Q. Counsel asked you who discharged you; this is something new to me; I want to know what this was, what was done, what there was about it; were you discharged, by whom, and for what?

A. Well, Mr. Linch was running the yard at that time, and there was a man by the name of Lyle, I think, was braking in the yard—Charlie Lyle—and we were switching coaches, the train from the east, the passenger train from the east. We took the coaches down
77 east of the Headquarters Hotel and threw them in north of the water-tank; set them in there with the switch-engine. They were cleaned there so that they could get coal and water and so on; have the coaches cleaned ready to go back again. The passenger train from the west was late. These coaches had been cleaned, and, when that train came in, hitched onto the coaches from the west and went down to the tank and run in and coupled onto the eastern coaches, and, after we had coupled onto the eastern coaches, pulled out onto the main line and give them a kick up the main line——

Q. Explain what you mean by kick up; I understand it; still all the jury may not.

A. To start them up the track with the engine and cut them off and stop the engine and part of the train and then let them go on.

Q. Give them a push with the engine and then stop the engine and let them go on?

A. Yes, sir.

Q. That's what you call a kick?

A. Yes, sir; I was tending switch; the cars run by me; it was down grade there, and after the cars stopped, instead of standing still the way they generally done—it was a little warmer than it had generally been; the coaches ran better. After the coaches stopped, instead of standing still the way they generally done, they started back; it was pretty dark, and the other man, he hollered to me; he says, "Catch these coaches and I will cut them off." So I throwed the switch back onto the side track to catch the coaches that came in from the west, and I was intending to ride them in on the side track and stop them with the brakes, while he would go up on the main line and couple onto the other coaches, the coaches to take up in front of the Headquarters, ready to go east. After he had started the coaches in on the side track—I stood down east of the switch a little ways—I stepped on the head coach—the engine was on the east end of the coaches pushing them in on the side track—and as I stepped onto the head coach I looked up the main line and saw
78 the coaches running back—the coaches we had throwed out up the main line—and I give the engineer the signal to stop, but the brakeman in the meantime had cut them off so he could not hold them. I set the brake, but they was going with such speed that I could not stop them. As the two coaches came together it knocked the corners off the two coaches. One was a tin-roofed coach; it struck that and bent that tin roof right down over the end of the coach, over the window and door; knocked the platform and steps off from each corner; jammed the coaches somewhat.

Q. Go on. Anything else? Was that what you were discharged for?

A. Yes, sir.

Q. Were you discharged for anything else?

A. No, sir.

Q. That was along in what season of the year?

A. That was in the spring.

Q. Would you have worked in that yard that summer if you hadn't been discharged?

A. No, sir.

Q. You were just working there during the winter, as you explained before?

A. Yes, sir.

Q. You said you had your stock—horses—here ready to go out onto your farm?

A. Yes, sir.

Q. The next fall, as soon as you came back here, you say the same man that discharged you hired you and took you back again?

A. Yes, sir.

Q. Was Bassett, this engineer that you complain of being careless in this case, was he here the winter you was here before—was he in the yard?

A. No, sir; he wasn't in the yard in the time I was at work there.

Q. When you went down to Bassett this night—the engineer the night you were hurt—did you ask him or request him to do
79 anything that you hadn't been instructed to request him to do by the yardmaster?

A. I did not; no, sir.

Q. You just requested him to do what the yardmaster had requested you to go and tell him?

A. Yes, sir.

Q. The difference between you and him was, you say, that he wouldn't do what the yardmaster told him to do?

A. Yes, sir.

Q. And you told him you were not running the yard—you were not yardmaster; you couldn't help it?

A. Yes, sir; I don't remember exactly the conversation that passed between us at that time. I remember of my telling him that and of some dispute.

Q. But can't remember the very words?

A. No, sir.

Q. At the time this injury occurred you were ordered to back onto number three west of these cars and hitch onto them?

A. Yes, sir.

Q. Now, who was it that hitched the engine onto the three cars?

A. I think I coupled the engine onto the cars myself. It was either myself or Mr. McLean; we both stood there together.

Q. It was either McLean or yourself?

A. Yes, sir; he stood on one side of the foot-board and I stood on the other.

Q. When you hitched onto these three cars, who cut them off from the cars that were hitched to them, back of them?

A. Mr. Galvin.

Q. Galvin cut those off from the cars that were back of them?

A. Yes, sir.

Q. Then you say you gave the signal to Bassett, the engineer, to go ahead?

A. Yes, sir.

80 Q. Where did you stand when you gave the signal to Basset to go ahead?

A. I stood at the hind end of the engine on the outside of the track—just stepped off from the foot-board.

Q. Stood off from the track outside of the engine and close to the rear of the engine?

A. Yes, sir.

Q. And you gave him the signal to go ahead?

A. Yes, sir.

Q. Is that the ordinary course in such cases?

A. Yes, sir.

Q. Then he moved ahead westerly?

A. Yes, sir.

Q. Until he came over the switch on the main track?

A. Yes, sir.

Q. What was done then?

A. He was given the signal to stop.

Q. Who gave that signal?

A. I did.

Q. Then what was done?

A. The switch was thrown over.

Q. Who threw the switch?

A. I did.

Q. You turned the switch so that the cars in backing, instead of going onto number three, they would go onto number five?

A. Yes, sir.

Q. When you threw the switch what was done?

A. He was given the signal to back up.

Q. Had you been on top of these cars from the time they were hitched onto and you gave him the signal to go on until the time you set the switch to throw them onto track number five?

A. I had not.

81 Q. Now, then, when he run up you set the switch so as to throw them onto number five; then you gave him the signal to back?

A. Yes, sir.

Q. Where did you stand when you gave him that signal?

A. On the ground.

Q. Hadn't yet been on the cars at all?

A. No, sir.

Q. Very well; when he backed in how soon did you get onto those cars?

A. Well, I got on, maybe, one car-length below the switch.

Q. And as you backed in you were going eastward, were you not?

A. Yes, sir.

Q. On what end of what car did you get when you got on?

A. I got on the west end of the hind car.

Q. Got up the ladder there on the hind car?

A. Yes, sir.

Q. That is, the end of the car in the direction from which it was moving?

A. Yes, sir.

Q. When you got up there what did you do?

A. I gave the engineer the signal to back up seven or eight cars. I don't remember which it was, but either seven or eight.

Q. Was there that distance—seven or eight cars—in the direction in which you were backing before you came to any other cars on that track?

A. Yes, sir.

Q. Was it or was it not your duty to give that signal for him to back?

A. It was.

Q. As you were backing there was it or was it not your duty to go on top of that car?

A. Yes, sir.

82 Q. Was it or was it not your duty when you got on top of it to proceed to the east end in the direction in which it was moving?

A. Yes, sir.

Q. Why so?

A. In order to watch the track below me, in order to be able to give the engineer signals how far back to come.

Q. You were standing there with your lantern and would see as you approached the cars, and then you would give the signal to him—how would you give the signal to him as you approached, after you had given him the signal to back up?

A. After he had backed up awhile—it didn't make any difference how far he wanted to back up—when he got close to the cars, if he was going pretty fast, while we was off some distance, I would give him the number of cars——

Q. How would you give him the number of cars?

A. Like that.

Q. By moving your lamp you would show him the number of cars he had yet to go?

A. Yes, sir; so he could slack down less and less until we got there.

Q. Now, Mr. Mares, unless in the case of sudden danger and where a signal was given him to do so, would it ever be admissible or safe for him to stop the cars as suddenly as he did there?

A. No, sir; I don't think it would.

Q. Do you know whether it would or not?

A. I know it would not.

Q. Is it customary ever to stop cars in the yard with one of those switch-engines so suddenly as that, unless it would be a case of sudden danger and unless he had a signal to do so?

A. No, sir.

Q. Mr. Mares, at that time, until he got a signal to stop, had he any right to stop those cars, according to the rules of that yard?

A. He had not.

83 Q. Had you any reason to expect that those cars would be stopped at all or stopped with that rapidity and suddenness at that time?

A. I had not.

Q. When you stood there on the rear of that car on that night, and just before you were hurt, did you stand any closer to the rear end of that car than brakemen are accustomed to stand, and than they should stand, looking ahead as you were for the rear track?

A. No, sir.

Q. Then you were at the place your duty called you at that moment?

A. Yes, sir.

Q. Even then, Mr. Mares, if no signal had been given him to stop—if he had seen no signal after your first signal just to back—this would have been reckless and careless for him to stop so suddenly until a signal was given him?

A. No, sir; he had no business to have stopped at all until he received a signal.

Q. If he stopped so suddenly would it be reckless and careless?

A. Yes, sir.

Q. With your experience in railroading, state whether such a sudden stop as that would or would not be likely to throw any person from the car.

A. Yes, sir; it would; an engine handled the way he was handling that at the time.

Q. Did Galvin tell you the car to get on?

A. No, sir; he didn't.

Q. As a matter of fact wouldn't every brakeman, under the circumstances, know where it was his duty to get?

A. Yes, sir.

Q. It wasn't necessary to tell you?

A. No, sir.

Q. How far had you backed on track number five before you fell?

84 A. Well, I think we had backed some, probably five or six cars.

Q. Before you fell?

A. Yes, sir.

Q. Now, on track number five?

A. Yes, sir; that is from the switch.

Q. After you fell, Mares, am I right that he kept on backing after he reversed the engine back, until as you lay there the locomotive passed you—the switch-engine—and to that switch-engine at that time were attached three cars?

A. Yes, sir.

Q. Had he yet reached the cars in the rear?

A. No, sir.

Q. After the three cars and locomotive or switch-engine had passed you?

A. Yes, sir.

Q. Do you know how much further it was—there were three cars

and the switch-engine, you say, that he backed after you fell and that he hadn't yet reached the other cars—do you know how much further it was to the other cars than that?

A. No, sir; I do not.

(Recross-examination by W. P. CLOUGH:)

Q. How did the reversal of the engine affect these cars on this occasion—any different from what it always does whenever an engine is reversed?

A. Well, it depends a good deal how and in what manner an engine is handled when it is reversed.

Q. As I understand you to say, as soon as the reversal of the engine took place and the speed was checked, then you fell off, isn't that true—the speed was so great it gave them a terrible jerk—isn't it true that just as soon as the engine was reversed and the speed checked you fell off? Isn't that true—just as soon as the engine was reversed and the speed checked you fell off then?

85 A. Why, as soon as the slack was taken out of the cars; yes, sir.

Q. Will you please tell me what was the difference between the effect of the reversal of the engine on those three cars and the reversal that always takes place under similar circumstances in handling cars? How were those cars jerked differently than the cars are always, naturally?

A. In the first place, he was handling the engine in a reckless manner; had been from the time he started the engine in the first place until I was thrown off.

Q. Do you mean to say he ran too fast or stopped too quick, or what?

A. I mean to say he was running too fast——

Q. Then you don't find fault with his reversal of the engine, because that is common, isn't it, in the yard?

A. No, sir.

Q. It ain't common to reverse an engine in the yard?

A. Not in that manner.

Q. How can you reverse an engine except in that manner?

A. You can by shutting the steam off—closing the throttle—then reverse the engine and give her steam slowly.

Q. I know, but you have to reverse the engine before you can do that haven't you? Are you enough of an engineer so that you know anything about handling an engine anyway?

A. I am not an engineer. I know nothing about an engine any more than I have been around an engine and saw an engine handled. I am engineer enough so that after an engine is steamed up and in running order, I could set her and move her ahead or forward or back. Aside from that—that's all I know about an engine.

Q. Don't you know, Mr. Mares, that the process of switching is a constant bump from the beginning to the end of it?

A. No, sir; I do not.

Q. Did you ever see cars taken in and set out without a

86 similar bump occurring—isn't there always a bump when the slack is taken out?

A. Of course there is a slight jar—more or less.

Q. Isn't the sound of switching so great that you can hear the sound of the bumping 50 or 60 rods off—that very frequently it is?

A. Yes, sir.

Q. Didn't you expect that when that man got the 7 car-lengths or so that you motioned that he would stop? You signalled him to back 7 or 8 car-lengths, didn't you?

A. Yes, sir.

Q. Do you pretend to say it wasn't his duty when he approached the end of the 7 or 8 car-lengths to stop?

A. Yes, sir.

Q. He ought to have kept right on, had he?

A. He ought to have kept on until he got a signal to stop; yes, sir.

Q. In other words, after you signalled him to back 7 car-lengths he was to keep right on, regardless of further signals?

A. No, sir; I was on top of that car to watch that track; to give that engineer signals when to stop the engine.

Q. When you gave the signal to go back 7 cars, was that a signal to go back 7 cars, or to go back indefinitely?

A. That was to let the engineer know how much room there was.

Q. When he got to the end of the room you told him, was it his duty to keep right on the same speed as before or slack up?

A. It was my duty to give him a different signal. It was my duty to give him signals from time to time as I saw we had room there, before we approached the other cars.

Q. If you give an engineer a signal to back 7 car-lengths, is it his duty to back 7 car-lengths, or is it his duty to keep right on as rapidly as he has in the beginning of it?

A. It would be his duty to back 7 car-lengths unless he got a signal to the contrary.

87 Q. Yes, sir; and to stop and prepare to stop at the end of the 7 car-lengths?

A. Unless he got a signal to the contrary.

Q. Then supposing you gave him a signal to back 7 car-lengths, at the end of the 7 car-lengths it was his duty to prepare to bring those cars to a stop at the end of the 7 car-lengths, wasn't it?

A. Yes, sir.

Q. You say you had already backed 5 or 6 car-lengths before you fell off?

A. No, sir; I beg your pardon. After I first gave him the signal to back up from where I was standing at the switch, I said perhaps we had moved back five or six car-lengths. At the time I gave him the signal to back ahead 7 or 8 car-lengths I was standing on top of the cars, in the meantime he had been backing up right along—was backing up when I got on the car—after I got on top of the car I gave him the signal to back up 7 or 8 cars, then I stepped to the hind end of the car. He backed up about three car-lengths and he then reversed the engine.

Q. You turned the switch, didn't you?

A. I did; yes, sir.

Q. That let the cars onto number five?

A. Yes, sir.

Q. Now, you got on the first car that passed onto that switch, didn't you—the first car that passed onto that switch you got onto, didn't you?

A. Yes, sir.

Q. And you got on just as soon as the first car had got part way past the switch?

A. Yes, sir; the first car was clear past the switch when I got on—the car that I got onto was by the switch when I got on.

Q. You was right at the switch, weren't you?

A. I was just below the switch.

Q. By the time you got onto that car and had given the
88 signal to back 7 car-lengths, how far east had that car got from the switch?

A. Why, I hadn't given and signal to back 7 or 8 car lengths.

Q. You got on the car right at the switch—at the time you got onto it and gave this signal how far had that car gone ahead from the switch?

A. Well, I could not say—not more than probably three or four car lengths at the outside.

Q. How many car lengths did you calculate the obstruction was from the cars, the cars that were standing on the track east of the switch—how much space between the cars standing on the track number five and the switch itself, did you calculate there was?

A. I calculated there was some ten or twelve car lengths.

Q. And three car lengths had passed before you had climbed up and given the signal to go 7 car lengths? I want to know the space between the stationary cars on track five and that switch on five?

A. I understood the question to be after I had given the signal.

Q. No, sir. What was the space there?

A. Oh, probably 15 cars—15 or 18. I had an idea, of course I didn't know—I wasn't positive that there was just that much room there, but I knew that there was as much room as I gave signals for.

Q. Now, how far had you passed from that switch before that signal was given—how far had you gone east from it?

A. Before the signal was given of 7 or 8 cars?

Q. Yes, sir.

A. Three or four cars.

Q. Now, how do you know it was only three or four car lengths from the time you gave the signal until the speed was checked by the reversal of the engine?

A. Oh, I know it by the running of the cars.

Q. Do you know how far you were from the other cars when you were run over, from the standing cars?

A. No, sir.

Q. You have never known, have you?

89 A. No, sir; not to a car length.

Q. You hadn't any idea when you fell how far off you were, had you?

A. Yes, I had an idea how far they was off, certainly; if I hadn't had an idea what would I have been giving signals for?

Q. How far did you think when you fell you were from the cars that were standing there?

A. I thought I was five or six cars.

(Redirect examination by Judge WILSON:)

Q. The counsel asked you if they didn't always, when they stopped cars, reverse the switch engine.

A. No, sir; they do not.

Q. Did you ever in your life, before, know cars to get so sudden a jerk as that under such circumstances?

A. No, sir; I never did.

Q. What is the difference between that and the way cars are usually stopped in the yard when switching? Explain to the jury.

A. The difference is, generally a switch engine, the steam is shut off, then the engine is reversed and gradually given steam again. They open the throttle gradually so it takes the steam gradually.

Q. When you shut it off it would leave it as if you were to take the engine away entirely; the cars would keep on with their motion growing less and less and less—less.

A. Yes, sir.

Q. It wouldn't pull them forward at all. In this case what did he do? Explain it.

A. As he throwed the level over, why, it stopped the engine suddenly and gave the cars a jerk.

Q. Throwing the lever over, did that turn the wheels forward?

A. Turned the wheels forward; yes, sir.

Q. Where it had before been going backwards?

90 A. Yes, sir.

Q. That, you say, gave the car a jerk?

A. Yes, sir.

Q. Taking up the slack and jerked you off?

A. Yes, sir.

Q. You say you never saw such a jerk before in the yard or in any yard under such circumstances?

A. No, sir.

Q. If he had have stopped in the ordinary manner would you then have been hurt?

A. No, sir.

Q. You stated that he had been acting recklessly all the evening after you waked him up?

A. Yes, sir.

Q. Now, you have stated in this, all the way through, to the jury, three or four car-lengths; did you mean you had measured, or were giving according to your ideas, just merely, as you might say, guesswork?

A. That's the way we generally measure distances in the yard; say, by so many cars.

Q. And by your eye?

A. By the eye; yes, sir.

DANIEL F. GALVIN, called as a witness in behalf of the plaintiff, being first duly sworn, testifies as follows:

Q. Mr. Galvin, where do you reside?
A. Fargo.
Q. How long have you lived here?
A. For two years past.
Q. What is your age?
A. Twenty-three years old the 27th of last April.
Q. What is your occupation?
91 A. A railroad man; I last was employed as a freight conductor.
Q. How long were you freight conductor?
A. Something over nine months; about nine months.
Q. On what road?
A. The Northern Pacific.
Q. When did you cease to be freight conductor?
A. The 19th of last month.
Q. Prior to being freight conductor, what was your business?
A. Yardmaster.
Q. Where?
A. Both at Fargo and Jamestown.
Q. How long were you yardmaster at Fargo?
A. About a year.
Q. Were you yardmaster in this yard at the time of the accident to the plaintiff?
A. Yes, sir.
Q. How long had you been before?
A. I think it was the latter end of July or about the first of August I took charge of the yard here.
Q. The latter end of July or first of August before he was hurt?
A. Before he was hurt.
Q. He was hurt the 31st day of October, and you commenced about the first part of August or latter part of July?
A. It was the first part of August.
Q. The first of the August before that?
A. Yes, sir.
Q. Were you continuously there from the first of August up to the time Mares was hurt?
A. Yes, sir.
Q. How long after that?
A. Until the 4th day of last July.
Q. Just after that you went where?
92 A. To Winnipeg.
Q. What were you doing at Winnipeg?
A. I broke for two weeks; run a construction train there for nearly a month.
Q. That is, run it as conductor?
A. Yes, sir.
Q. Then you came here?
A. Yes, sir.

Q. Where did you go then?
A. I went to Jamestown.
Q. On this road?
A. Yes, sir.
Q. Work for this company?
A. Yes, sir.
Q. What did you do at Jamestown?
A. I run the yard there about three weeks.
Q. As yardmaster?
A. Yes, sir.
Q. Then from Jamestown where did you go?
A. I went running a freight, as freight conductor.
Q. For this company?
A. Yes, sir.
Q. Have you now told us all that you have worked for this company, or have you worked for this company before the times you spoke to us about?
A. Yes, sir; I worked for the company about three weeks in May.
Q. May of what year?
A. Two years ago—something over two years ago.
Q. Where and at what business?
A. I was brakeing between Fargo and Jamestown, for Conductor Pillon.
Q. Was that the first you worked for this company?
93 A. Yes, sir.
Q. Did you railroad any before you came to this company?
A. Yes, sir.
Q. Where?
A. On the Manitoba railroad.
Q. How long did you railroad there?
A. Very near nine years, in various capacities.
Q. Now you may commence and tell in what different capacities you were at work for that road.
A. Well, when I was a boy I peddled spikes for them while they were laying track—well, I plowed one summer for planting trees—when I was big enough to go brakeing, I went brakeing. I worked for them from the time I was able to brake until two years ago.
Q. Well, what did you do then?
A. I left there and came here.
Q. Well, were you in any different capacity there save brakeman?
A. I broke for two or three years and run a train there and run yards there for two or three years.
Q. And run a train and run yards two or three years?
A. Yes, sir.
Q. You did this before you came here?
A. Yes, sir.
Q. Then you came onto this road and did what you did here?
A. Yes, sir.
Q. Then, Mr. Witness, are you or are you not familiar with the course of running a yard like this at Fargo?
A. I am; yes, sir.

Q. Are you or are you not familiar with the signals given and the duties of the different employees in the yard?

A. Yes, sir.

Q. Were you or were you not familiar with those duties and those signals, and the manner of conducting a yard at the time Mares was hurt?

94 A. I was; yes, sir.

Q. Do you know Bassett who was engineer of the switch-engine at the time Mares was hurt?

A. I do.

Q. How long have you known him?

A. I have known him for very near two years.

Q. Where?

A. Here in Fargo.

Q. What was he doing while you knew him?

A. He was running switch-engine when I first got acquainted with him.

Q. In this yard?

A. Yes, sir.

Q. When was that?

A. That was some time in August.

Q. How long had he been running a switch-engine in this yard before the injury to Mares occurred, to your knowledge?

A. Well, he had been running it—I could not exactly say how long—he had been running it some time.

Q. About your best recollection—you can't state just how long—state it according to your best remembrance.

A. He had been running four or five months I should think.

Q. To your knowledge while you were acquainted with him?

A. Yes, sir.

Q. Were you, while he was so running, yardmaster in the yard in which he was running?

A. I was yardmaster at night.

Q. Who was, during that time, yardmaster during the day?

A. Mr. Baker.

Q. Does Baker live here?

A. He does.

95 Q. Is he in town?

A. He is,-I believe. He was the last I knew of him.

Q. How long ago was that?

A. A day or two ago I seen him.

Q. Is he yet in the employ of the Northern Pacific Company?

A. Yes, sir.

Q. Here?

A. Yes, sir.

Q. He was day yardmaster and you was night yardmaster?

A. Yes, sir.

Q. Who, if anybody, was over both of yon?

A. S. G. Fulton.

Q. Is he here?

A. He is here in town; yes, sir.

Q. Is he still in the employ of the Northern Pacific Company?
A. Yes, sir; I believe so.
Q. Where?
A. At Helena, I think.
Q. At Helena?
A. Montana.
Q. But you say he is here at present?
A. Yes, sir; he is here at present.
Q. Was he in the yard over the yardmaster, having control of the yard at the time Mares was hurt?
A. Yes, sir.
Q. How long had he been before that?
A. Why he was all the time I was here.
Q. Was he the man that had control of the yard?
A. Full charge of hireing and discharging brakemen and yardmasters.
Q. He was your superior to whom everything was communicated?
A. Yes, sir.
96 Q. How long had you known Mares before his injury?
A. Since he commenced to work for me.
Q. How long was that, about?
A. He worked about two weeks.
Q. Now, he had worked about two weeks with you?
A. Yes, sir.
Q. Now, Mr. Witness, you say you were night yardmaster?
A. Yes, sir.
Q. You had no control but at night?
A. Nights, that's all.
Q. At night you had supervision?
A. I had full charge of the yard at night.
Q. Now, during that time Bassett was engineer?
A. Yes, sir.
Q. Was he night engineer or day engineer, how was that, or both? Explain.
A. They worked one week day times and one week nights. They changed every Sunday afternoon.
Q. Then, during the time that Mares was there, Bassett would have been at work with Mares for about a week only?
A. That's all.
Q. Were you present at the night of this injury to Mares?
A. Yes, sir; I was.
Q. I wish you would now go on, in your own way, and explain to the jury how that occurred; commence with that night and go on and explain how that occurred.
A. Well, during the fore part of the night we had been working, and about two o'clock I had a lot of work to do checking up the yard and everything. The engine was standing still, it was standing on the headquarters track—the side track at the hotel—and after I had checked over the yard and made out my list and everything, I went in our room—the yardmaster's room, and woke up my men
97 and was walking down in the yard. I walked down as far

as the corner at the flag shanty, and I told Mares to get the switch-engine and back down on number three, the crossing where the flag shanty is on Broadway. I told him to get the switch-engine and back down on number three, and he went up there. Everything was still that time in the morning, and I don't know what he said to Bassett, but I heard some dispute between him and Bassett. I heard they were angry and I heard Mares swear; he said "God damn it, I can't help it," he says, "I am not running the yard. I was told to come here and get the switch-engine." I don't know what reply was said. I don't know what they were disputing about. I kept on down, threw the switches as I went on down the track, and they backed down in a short time. He started from the headquarters and backed down on number three very rapidly.

Q. Who did?

A. The engineer, Bassett.

Q. You say he backed down very rapidly?

A. Yes, sir.

Q. How could you tell that?

A. Well, I could tell by the way he was going and the exhaust of the switch-engine.

Q. That is, the noise that it makes?

A. The noise; yes, sir.

Q. Well, was he or was he not, at that time, going more rapidly than was prudent or safe?

A. It was very improper to go that way over the switches and too fast in the yard.

Q. Then, you say when he started he started in this way?

A. He started very quick; yes, sir.

Q. Did he do so at once, immediately, when he started?

A. Yes, sir; they coupled on to the cars——

Q. On what track?

A. On number three, I believe it was; one of those tracks
98 in the lower yard. I told them to go ahead on number five.

Q. You say you hitched onto the cars on number three—onto how many cars?

A. The track was full of cars; I cut off behind the three head cars.

Q. Cut off three of the cars?

A. Three of the cars.

Q. And told them to go ahead?

A. To go ahead on number five and they pulled up over the switch and was backing down on number five, and he was abusing the engine then——

Q. Explain what you mean?

A. Well, he was going as fast as he could go—as fast as he could get her to go—and I don't know who swung the switches, I stayed where I was.

Q. You didn't see who turned the switches?

A. No, sir; I don't know who turned the switches.

Q. You were not close to them?

A. No, sir; not at that time.

Q. Could you tell by the sound of the engine just as well as if you had been standing by and looking at it, whether he was abusing it, as you say, or not?

A. Yes, sir.

Q. Well, in the night at that time or at any time, was it or was it not safe to go as he was then going?

A. It was very unsafe.

Q. He went up over the switch?

A. Yes, sir.

Q. Then what?

A. He was backing down and the first thing I knew, I heard him reverse the engine—he reversed her without shutting the steam off and that was the first thing that attracted my attention—it was something more than was usually done.

99 Q. Well, was it or was it not very unusual under such circumstances to reverse it without shutting it off?

A. It was; yes sir.

Q. It was or not?

A. It is very seldom they reverse an engine with shutting her off when switching.

Q. Well, is it ever safe or prudent to do so, or is it ever done so unless there is some immediate danger and a signal given for it?

A. Not in that way.

Q. Explain to the jury.

A. Well, in switching cars they always reverse their engine, that is, the way they have for stopping cars, in the yard it is very seldom they stop cars by the brakes, they reverse the engine, but before reversing her they shut off the steam, the steam an't in her cylinders and she don't have the force.

Q. Say an engine is working a train and you want to stop those cars, how would you usually do it? You say you would shut off the steam?

A. Shut off the steam; yes, sir.

Q. When you shut off the steam it would keep going of its own motion as if the engine was off?

A. Yes, sir.

Q. The engine wouldn't give it any motion any more?

A. No, sir.

Q. Just keep going slower and slower and slower until it stopped?

A. Yes, sir.

Q. You say that's usual under those circumstances?

A. Yes, sir.

Q. What did he do?

A. He swung her over without shutting her off at all.

Q. In reversing her—threw her over, what do you mean by that?

A. I mean without shutting off the steam. He reversed
100 the reverse lever over and she still was working steam, so at the time she was reversed ahead—she worked steam ahead.

Q. He threw all the steam so as to turn the wheels forward at once?

A. Yes, sir; so that the wheels would slip around. They would still be moving backwards for the time being.

Q. And you say what would have been proper and prudent there to have done, if he wished to stop, would have been just to have stopped his engine, to have turned the steam off, and let the engine roll without any steam either way?

A. Yes, sir; and then reverse her after she had been shut off, without he got a signal to stop from somebody—to stop sudden—of course it would be proper to do it then.

Q. What did you say?

A. If he got a signal from anybody to stop immediately, it was his place to throw her over. It is very seldom you will see them throw over an engine or abuse an engine in that way.

Q. Explain to the jury just what the effect would be of doing just what he did at that time.

A. Well, the effect would be it would jerk most anyone from the top of the cars if they weren't expecting it. If they were on top and expected a man to throw the engine over the could save themselves; if it was unexpected to them, it would jerk a man off. There is a slack of 6 or 8 inches in between the heads of the cars. A switch-engine is very quick. They can stop or start a car quicker than any other engine can. When he was backing up working steam, the slack would all be in the cars; when he reversed her ahead it would snap them out. If you had hold of six or right or ten cars it would break them in two, as a general thing.

Q. Such a snap as he gave that night would break them in two, you say?

A. Yes, sir; two or three cars it wouldn't be so apt to break them, there wouldn't be the force behind.

101 Q. You say those switch-engines work a good deal more quickly and jerk a good deal more than any other engine?

A. Yes, sir.

Q. They are made for that purpose—to act quickly?

A. Yes, sir.

Q. Was it the duty of the engineer Bassett at that time to stop the car at all, at that time, unless he was signalled so to do?

A. No, sir; he had a right to keep on going until he got a signal to stop.

Q. Had a person who was on the car a right to expect he would do so, according to the rules? Was that a rule of the yard, that he had a right to expect him to do, until he got a signal to stop?

A. Yes, sir.

Q. Mr. Witness, in backing cars in that way, when you run up from track number three and then turned that switch and threw them onto track number five, when you went to back down on track number five, was it the duty of anybody to be on top of the cars as they backod down?

A. Yes, sir; it was either the duty for a man to be on top of the cars or on the rear end of the cars when we were backing down.

Q. When you were backing down there this night with these

three cars—backing down onto track number five—on what car was it the duty of the man that was on top of the cars to be?

A. On the rear car.

Q. On what part of the rear car?

A. The hind part of it, where he could see the track plainly ahead of him.

Q. So that he could watch the track ahead of him to see if there was any thing there?

A. Yes, sir.

Q. You say that was his place or duty at that time?

A. It was; yes, sir.

102 Q. Whose duty was it to give the signal, the man on top of the car, in such a case?

A. It was; yes, sir.

Q. And if that person had given a signal to back, you say it was the duty of the engineer to watch for a signal and to back until he saw a signal to stop?

A. Yes, sir; it was.

Q. Supposing a signal had been given to him to back 7 or 8 or 9 or 10 cars, or any number of cars, how would that signal be given?

A. It would be given up and down as many times as you wanted to go car-lengths.

Q. Up and down with what?

A. With the lantern.

Q. As many cars as they wanted to go they would move their lantern up and down?

A. Yes, sir.

Q. I will ask you first, after they crossed the switch, before they commenced backing, must there have been or do you know whether there was a signal to back?

A. I couldn't really say about the signals.

Q. Well, Mr. Galvin, would he have commenced to back or was it his duty to commence to back until he got a signal to back?

A. No, sir; it was not.

Q. When he commenced backing on track number five, was it or was it not his duty to not stop until he got a signal to stop?

A. It was his duty to keep on backing until he received a signal to stop.

Q. If he had gotten signals of seven or eight cars as you have explained, then what was his duty?

A. It was his duty to go that distance and keep on going until he got a signal to stop.

Q. And in stopping, unless he saw a signal of danger or

103 some other signal to stop quick, was it his duty to stop slowly or to stop quickly as he did there?

A. It was his duty to stop slowly unless he got a signal to stop quick. That was what drew my attention, the way his engine was reversed, that drew my attention and I looked around.

Q. How far were you from them when this engine was thus suddenly reversed?

A. A very short distance; not more than two or three car-lengths.

Q. Well, would the way that was done have arrested anybody's attention?

A. It would; yes, sir; that knew anything about switching.

Q. Was it or was it not done in a reckless and dangerous manner?

A. It was; yes, sir.

Q. That is the fact that arrested your attention at the time?

A. That is what drawed my attention to look around.

Q. When you looked around what did you see?

A. I didn't see Mares; I didn't see him fall.

Q. What did you see?

A. I seen his lamp go, I didn't know whether he had fell or not.

Q. Did you know he was on the train—on top?

A. I knew somebody was.

Q. You didn't know who?

A. I didn't know who it was.

Q. You say as soon as you looked around, after this jerk, you saw a lamp fall, did you see the lamp only?

A. The first I knew of a man falling, was, a man hollered.

Q. Then the fall came immediately after the jerk?

A. I suppose so.

Q. You say the lamp fell immediately after the jerk?

A. Yes, sir; when I looked around I seen it fall.

Q. What did you do then?

A. I ran up there.

104 Q. Did you hear any cry of distress?

A. Yes, sir; I did; that's what I heard, I heard a man holler. I run up there; the engine stood about opposite to him, or very nearly opposite to him, and in a short time we were all around there every one of us that were working there were around, and this Mares he accused Bassett then—

Q. State what he said as near as you can remember.

A. Mares he accused Bassett then of it being his fault that he got run over, he said "If you had obeyed my signal this wouldn't have happened." Bassett says "I did obey it." Mares says "No you didn't." Bassett called him a damned liar when he was lying there on the ground. I kind of took that to heart, and went for Bassett. I called him a name and went for him, and was going—would have whipped him right there but for Mares, he cried out "Straighten out my legs and let him go." I went and straightened out his legs and then I told Bassett to help us put him on the front of the engine; and we put him on the front of the engine and run him up in the front of the Headquarters hotel—took him off the engine at the Headquarters hotel and laid him on an express truck that was there,

Q. Do you know how many wheels had run over his legs?

A. I don't know how many wheels.

Q. How did he lay when you saw him?

A. He was sitting up like this.

Q. Holding his knees up like this?

A. Yes, sir; he was sitting on the ground with his hands this way onto his knees.

Q. Who were present when this occurred that you speak of, about calling him a damned liar, who were there?
A. There was myself and Johnny Ryan—
Q. Who was he?
A. He was fireman.
Q. Where is he now, do you know?
105 A. I don't know, he was here yesterday—and Bassett —
Q. That is the engineer?
A. Yes, sir; he was there, and George Brant—
Q. Who was he?
A. He was one of my brakeman—John McLean, he was another of my brakeman, and Richard Mares, himself.
Q. That was all that was there?
A. That's all that was there.
Q. You say they were all present when this occurred?
A. Yes, sir; all of them
Q. Now at that time, when that occurred, how near were these cars to being backed to the other cars that were on track number five?
A. Oh, it was some distance—it was eight or ten cars.
Q. Eight or ten cars still before they would reach track number five?
A. Where the cars were on number five, yes, sir.
Q. Then there was no need of stopping at the place they did at all?
A. No.
Q. Now did you see any of those signals given by Mares?
A. No, sir; I don't know anything about the signals, at all.
Q. You were not looking in that direction?
A. No, sir; the first thing that attracted my attention, was the reversal of the engine.
Q. That arrested your attention because it struck you as dangerous?
A. Yes, sir.
Q. What is the average length of these cars?
A. The average length is—from 30 to 33 feet is the average length of a box car.
Q. The lengths of these cars?
A. Yes, sir; they are making, lately, lumber cars a good deal longer.
Q. Well, that's the average length of a car, from 30 to 33
106 feet—what is the length of an engine?
A. I couldn't say.
Q. At the time Mares was hurt they had backed three cars past him, and the engine was about past him——
A. About opposite to him.
Q. And still behind them you say it was eight or ten cars before you reached the cars on track number five?
A. It was some distance. We judge cars by our eyes as close as we can—to the best of my judgment it was eight or ten cars. My idea was to back all these cars down on number five. I wanted to leave room and put all my through cars—cars that were for the

west—to set them in on this track number five. I wanted to shove them all down to make room. The three cars I had hold of was cars I was making up in another train.

Q. Explain what you were doing that night—whether there was any hurry—whether you had been asleep—explain the whole of it?

A. Well, I was very busy and I didn't have any foreman, I had to do all the work myself. I had to check the trains in and make out the switch list and check them out, do all the switching myself—I didn't have any man that I could depend on as foreman, nor any man that could have done it. I was allowed a foreman if I could get him. There was no man capable of filling that position.

Q. Was it necessary to have a foreman there?

A. It was to make the work easier on myself. I overdone myself all the time.

Q. But that particular night now, witness?

A. That particular night I was very busy and I was making up No. 11, that is the way-freight that leaves here going west 7 o'clock in the morning. There was a train coming in from the east. There is always a destination report made of these trains out at Detroit, 45 miles east of here, so that we know just about what is on the train before they get here—how many cars there are for Fargo and points west of here. I wanted to make room for through cars.

107 I set my cars that went west on one track and those that remained at Fargo on another track. These three cars I had hold of were for Sanborn, that's west of here. I had to keep those cars—trains going out we make them up in station order—if there is a car for the first station put it next to the engine, the second next to that and so on—and keep them as near in station order as I could.

Q. Well, in the earlier part of the night, Mr. Galvin, had you been at work?

A. Yes, sir.

Q. What hour of the night was it about when this injury occurred?

A. It was in the morning, some time between four and five o'clock.

Q. Was it or was it not day-light?

A. It was not; no, sir.

Q. Now, in the early part of the night you say you had been at work, had you ceased work for any length of time or any time?

A. About an hour.

Q. Was that or was it not usual?

A. It was; yes, sir. There was times we would get an hour's rest and times we would get two or three hours at night, just according to how the work was, and nights we couldn't get any rest at all—couldn't have time to stop for lunch. There was always a growl and kick if they didn't get rest at night. There was always a kick and grumbling. That night they got an hour and probably more than an hour.

Q. But you got them out?

A. I did.

Q. You hadn't gone to sleep yourself?

A. No, sir; I never went to sleep, my hands were too full to do any sleeping at that time.

Q. You have explained that you sent Mares up to Bassett to get him to start the engine?

A. Yes, sir.

Q. Was there or was there not any hurry at that time to
108 do anything?

A. There was; yes, sir.

Q. What was it?

A. We wanted to get our work done—we had to do it as quick as we could.

Q. On account of that approaching train was there any reason why there was any hurry?

A. To make room for them; yes, sir.

Q. Did you or did you not explain to Mares that there was a hurry and to go up and get the engine?

A. I told him to hurry up.

Q. He understood this when you sent him up to the engine?

A. He understood that I was in a hurry.

Q. You sent him up to get Bassett and the engine?

A. Yes, sir; well, in fact, I had three men and there was none of the three that was experts at yard work—they was all new men. Mares I used generally to tell if I had two or three switches to make; he was the man I used to tell what to do.

Q. Of the three was he the man that you relied on most?

A. He was; yes, sir.

Q. Was he doing or was he not doing anything else when he went and woke up Bassett and ordered him to go back for these cars; was he or was he not doing anything more than what you told him to do?

A. He was doing just what I told him to do.

Q. What was his duty?

A. His duty was to do it, and to do it as soon as he could.

Q. You say when he went up there that you heard an altercation between them for some time, and you heard him say, "Damn it, I am not running this yard?"

A. Yes, sir; I heard a dispute between them; well, in fact, there was always some dispute between the men and the engineer; this Bassett was a very bad man to get along with.

109 Q. You say there was always some dispute between the men and the engineer?

A. Yes, sir.

Q. Now, Mr. witness, please explain this to me; first, what kind of a man was Mares as to a good disposition, attention to duty, etc.?

A. Well, he was a good quiet man; good industrious man, as far as I knew.

Q. Well, as far as you ever saw of him, did you ever see anything else than a peaceable, orderly disposition?

A. No, sir; I never did.

Q. What were his habits?

A. As far as I knew they were good; while he was with me they were good.

Q. While he was with you they were good?

A. Yes, sir.

Q. You had backed down these three cars on that track No. 5?

A. Yes, sir.

Q. You have explained to the jury that, at the time this engine ceased to back—was reversed ahead so quickly—they hadn't reached within 8 or 10 car-lengths of any cars on the track?

A. No, sir.

Q. There was no need of stopping?

A. There was not.

Q. Did you state or did you not state whether you could tell just as well the way this engine was stopped and the suddeness with which it was stopped as if you had been looking at it when it stopped?

A. I could tell by the exhaust.

Q. By what you heard?

A. By what I heard; yes, sir.

Q. Did you hear that distinctly?

A. I did. I didn't see him reverse it, I heard it. I can tell by the exhaust of an engine when she is shut off and whether
110 she is reversed and whether she is reversed without being shut off.

Q. Now, then, Mr. Galvin, you may come to this man Bassett; as an engineer, what kind of a man was he?

A. Well, he was a hard man to get along with—a mean man to work with. He used very poor judgment, and if I would check him up or scold him for going too fast—too reckless—he would go slow, would snake along so I couldn't do nothing with him—go too slow entirely, just to be mean.

Q. Well, on the contrary, if he was going too slow what would he do?

A. He would go too fast.

Q. Well, how much too fast? Just explain to the jury in your own way.

A. Well, abusing the engine; handling her rough; handling the cars rough; running too fast.

Q. Well, in doing that, was it or was it not endangering the safety or lives of those that were working around him?

A. It was; almost anyone; the best of railroad men.

Q. You may explain, if you please, Mr. Witness, how long Bassett had been accustomed to behave this way and act this way in that yard.

A. He did it all the time he was with me.

Q. I will ask you whether you had, in fact, reported that to your superior officer in the yard?

A. I had reported him verbally; never made out any written report.

Q. Well, had you reported him about his recklessness in this manner you speak of?

A. Yes, sir.
Q. Frequently or otherwise?
A. I have done it several times.
Q. Before Mr. Mares was hurt?
A. Yes, sir.
111 Q. Who did you make that report to?
A. Mr. Fulton.
Q. Fulton was the man who had charge of the yard?
A. Yes, sir.
Q. You say you had explained this matter to him several times before Mares was hurt?
A. I told him two or three different times, anyway, before Mares was hurt.
Q. You may state an instance, if you can recollect, in which Bassett was accustomed to act in this way.
A. Well, he was laid off once before that for getting off the track.
Q. Well, did he get off the track on account of this recklessness?
A. Well, I couldn't say, It was by going too fast he got off.
Q. Well, was he going too fast?
A. He was going too fast; yes, sir.
Q. I would like to know if this witness saw this occurrence? (By attorney for defendant.)
A. Yes, sir; it was in the evening. When they would be coming or going to work; when they would be coming from the round-house or going from the office up to the round-house they used to see how fast they could go; they used to go very rapidly.
Q. Who do you mean by they, Bassett?
A. Yes; he was the worst of any of them.
Q. He used to run faster than any of them?
A. Yes; to the best of my knowledge.
Q. Well, to your observation?
A. Yes, sir.
Q. Were you there? Did you see these things?
A. Yes, sir.
Q. Go on and tell how it occurred.
A. Well, he was laid off then and then afterwards. Well, he jumped the track—the engine left the track.
112 Q. What was he doing when the engine left the track?
A. He was going towards the round-house.
Q. Where?
A. Up above the office, over a switch or frog.
Q. It was in the yard here?
A. Yes, sir; going over the crossings; he went over one crossing.
Q. Well, how fast was he going there?
A. I couldn't say how fast; fifteen or twenty miles an hour.
Q. Was it reckless and dangerous to run in the yard at any such rate of speed?
A. I believe eight miles an hour is the full extent of speed in the yard and six miles over crossings, or four, I wouldn't say.
Q. You say he was running how much at this time?

A. To the best of my judgment he was running fifteen or twenty miles an hour.

Q. Well, was that or was it not reckless to do that at that time?

A. It was; yes, sir; there was no need of it.

Q. Was he or was he not by the company discharged for that act?

A. He was; yes, sir.

Q. How long was that before Mares was hurt?

A. Well, it was along—I hadn't had charge of the yard very long before this happened.

Q. Well, was it more than two or three months?

A. It was a month or so, anyhow.

Q. Well, was it more than two or three?

A. Before Mares was hurt?

Q. Yes, sir.

A. No; it wasn't more than that.

Q. Then he had at that time been discharged by the company for this recklessness you have spoken of and after that had been taken back and was in the employ of the company at the time Mares was hurt?

A. Yes, sir.

113 Q. That discharge of him for this recklessness was before Mares was in the yard, wasn't it?

A. Yes, sir; it was. And then after Mares was hurt he was discharged for his recklessness?

Q. Again?

A. Yes, sir.

Q. Not for recklessness at the time Mares was hurt, but after?

A. No, sir; nothing done to him for that. I didn't make out a statement of it.

Q. How soon after Mares was hurt was it that he was discharged for this other recklessness?

A. I could not say; sometime, anyhow.

Q. Well, about how long?

A. I could not say whether it was later in the fall or early in the spring. I don't think he has worked since that time.

Q. Give just as near as you can—of course you can't give the days or weeks—was it a month or two or how?

A. I think it was all of that, if not more than that.

Q. That he was discharged for this second act of recklessness?

A. Yes, sir.

Q. Now while he was in the yard there under you, while you were night yardmaster, I want you to state to this jury whether or not he was accustomed to be, and whether or not it was his ordinary custom to be, negligent and reckless in his conduct there in the yard?

A. It was.

Q. Well, in doing business there that you observed?

A. It was; yes, sir.

Q. Could any person seeking to discover, have observed that and known it?

A. They could; yes, sir.

Q. What was his general reputation among those accustomed to

work in the yard and of persons there, what was his general
114 reputation there as to being careless and reckless?

(The defendant objects to this question upon the ground that it is incompetent and immaterial.)

Q. Prior to the injury to this plaintiff, and during the autumn when this plaintiff was injured, do you know what the general reputation of Bassett was as to being a careful or a careless or a reckless man in the performance of his duties as engineer? I simply ask you now, do you know what his general reputation was in that respect at this place—at Fargo, where this accident happened?

(The defendant objects to this question upon the ground that it is incompetent and immaterial; which objections are overruled by the court; to which ruling the defendant duly excepts.)

Q. Now, Mr. Witness, the first question is not what that reputation was, but do you know what his reputation was as to being reckless as here stated?

A. I do.

Q. State what it was.

A. My men—some of them—were afraid to work with him. They all talked among my men of his careless way of doing work, stating they were afraid of him. They were new men——

Q. I am asking you now what was his general reputation; I mean by that what was generally said about him as to whether he was reckless or not or careless or not?

A. He was reckless.

Q. Was that what was generally said; was that his general reputation?

A. Yes, sir.

Q. That he was reckless?

A. Yes, sir.

Q. Was it or was it not his general reputation that he was a dangerous man?

A. Yes, sir; it was.

115 Q. What kind of a tempered man was this man Bassett in the performance of his duty?

A. He had a very mean temper.

Q. Explain to the jury how that manifested itself there in the yard in doing his business.

A. Well, as I said before, if I would scold him for going too fast he would go too slow; he would be mean about it. If he was going too slow why he would rush things and take it out of the engine. Well, he would abuse her—abuse the engine; go too fast—tear things around.

Q. For instance, when he was told to make a coupling of cars here, now the cars are coming together, how would he do as to coming together, fast or slow, or at a proper rate of speed?

A. He would go too fast, as a general thing; come against the cars very hard at times.

Q. That was when you had been speaking to him about going too slow?

A. Yes, sir.

Q. Would he do it in a manner that was reckless and dangerous to those employed with him?

A. He would; yes, sir.

Q. Well, was he or was he not accustomed to do that?

A. He was; yes, sir.

Q. Was it this conduct in doing these reckless things, then, you reported to your superiors or employers?

A. Yes, sir; rough usage of cars in switching.

Q. Did you state to them about his being a dangerous man for the other men in the yard?

A. I don't know whether I stated that he was dangerous or not. I explained to them the way he was working.

Q. In that explanation did you tell them that he did these things that are dangerous?

A. Yes, sir; I told them what he did.

116 Q. And the things you told them he did, you say, are, as a matter of fact, dangerous for those who worked with him?

A. They are; yes, sir.

Q. Would any railroad man have known that?

A. Yes, sir; any man that knows anything about railroading.

Q. Would have known that what you told them showed him to be dangerous?

A. Yes, sir.

Q. Who was the master mechanic here at that time?

A. Adam Rupert.

Q. That is the man that had charge of the engines, etc.?

A. Yes, sir.

Q. Is he still here as master mechanic?

A. Yes, sir.

Q. Still in the employ of the Northern Pacific Railroad Company?

A. Yes, sir; he is.

Q. Still living in this city?

A. Yes, sir.

Q. And present in this city at this time; he is in the room?

A. Yes, sir.

Q. I think I understood you to have said that that mode of reversing that engine that night, doing it just as it was then done, would have thrown almost any one off the car?

A. It would, yes, sir, if they hadn't been looking out for it or expecting it.

(Cross-examination by W. P. CLOUGH:)

Q. Mr. Galvin, when did you enter the employ of the Manitoba company?

A. When I was a boy. I don't know when; when I was able to.

Q. Can't you tell about how many years ago that was?

117 A. No; I couldn't. I know I was very young.

Q. What year was it in?

A. I don't know. I ain't been keeping any track of how long it was. I know I was quite young. I wasn't able to do a man's work.

Q. How old did you say you were now?

A. Twenty-three years old.

Q. What positions did you say you occupied under that company altogether?

A. I peddled spikes for them. I plowed for them when they were plowing along the track to plant trees. I drove team for them, and when I got able to go braking, I went braking.

Q. About how many years ago was that you went braking?

A. It's about ten years ago; nine or ten.

Q. When you were about 13 years old?

A. I was 14 years old.

Q. You went braking then?

A. Yes, sir.

Q. How long did you continue braking for them?

A. I broke for them right along. I broke for over two years on one division.

Q. What division was that?

A. Between Breckenridge and Roller.

Q. On the main line; what was called the main line?

A. Yes, sir; for two years on one run, with one man most of the time.

Q. Did you get through braking?

A. I got through braking; yes, sir.

Q. What did you go at then?

A. I left the division and went on the north end.

Q. What do you mean by the north end; between here and St. Vincent?

A. No, sir; between Fergus Falls and St. Vincent. I was
118 on all the divisions of that road; worked at different places on that road.

Q. What did you do on the division between Fergus Falls and St. Vincent?

A. I was braking.

Q. All the time?

A. The last three or four years I was there — run the Crookston yard and run trains there.

Q. Did you run any train as conductor on the Manitoba road?

A. I did; yes, sir.

Q. When was that?

A. It was three years ago and less than three years ago.

Q. What sort of a train did you run as conductor on that road?

A. I ran a freight train; have run passenger trains one trip; I would run anything just as it happened to come.

Q. When you quit work for that company what were you doing?

A. I wasn't doing nothing until I came here.

Q. When you quit work what were you doing at the time and shortly before—the last you did for them?

A. Yes, sir. I was running a freight train.
Q. Running a freight train?
A. Yes, sir.
Q. What was the occasion of your quitting?
A. A tail-end collision.
Q. The celebrated Rothsay collision?
A. Yes, sir.
Q. You were the conductor in the caboose asleep and a train ran into your train and killed three or four passengers?
A. So stated; yes, sir. I happened to escape. I didn't get killed. I happened to be out of the car.
Q. You jumped out, but you left the passengers in, didn't you?
A. It was so stated I was asleep; yes, sir. I ain't in jail there.
Q. You were awhile, weren't you?
119 A. A very short while; yes, sir.
Q. As a result of that little unpleasantness they didn't want you any more?
A. No, sir.
Q. So you left and came up to Fargo?
A. Yes, sir.
Q. Then you went to work for the Northern Pacific?
A. Yes, sir.
Q. What did you do when you first came up here?
A. I went brakeing.
Q. Between what points?
A. Between here and Jamestown.
Q. How long did you continue at that?
A. I continued until my trial came off—about three weeks.
Q. After your trial had come off did you come back again?
A. I did, for a fact.
Q. What did you do then?
A. I went brakeing in the yard here.
Q. Under whom were you brakeing?
A. Well, Pat. Murphy was running as yardmaster.
Q. How long did you continue brakeing in the yard?
A. A short time.
Q. What did you do after that?
A. I took charge of the yard as soon as I learned it.
Q. What year was that, '79 or '80 or '81?
A. It was two years ago.
Q. '81?
A. Yes, sir.
Q. How long did you continue yardmaster?
A. Until the 4th day of last July.
Q. What was the occasion of your quitting then?
A. Pounding a couple of brakemen, or helping trying to
120 do it; they got away with me though.
Q. You were discharged for that?
A. Yes, sir.
Q. Had you been suspended before that?

A. I was suspended two weeks for throwing an engineer something like Bassett is, out of his engine.

Q. That is before you were finally discharged for pounding two brakemen?

A. Yes, sir.

Q. Then you are a man of experience?

A. Yes, sir.

Q. Killed three men down on the Manitoba road?

(To this remark of counsel, the plaintiff duly excepts. Counsel for defendant states "It is a matter of common notoriety;" to which remark the plaintiff also excepts, and the counsel for defendant states that he withdraws the remark.)

Q. Now after you were discharged, Mr. Galvin, when did you go to work again and what at? When you were discharged the last time, last July?

A. I went to work in September, I think.

Q. What did you do then?

A. I cleared up the Jamestown yard for them.

Q. What do you mean by that?

A. For the railroad company.

Q. What railroad?

A. The Northern Pacific road. It was blocked and they sent me there to clear the yard for them. They had three or four men there but none who could do the work—I could do it.

Q. What was done then?

A. I went to running a freight train for the same company—the same road.

Q. How long did you continue running that freight train?

121 A. Until the 19th of last month.

Q. Were you discharged then?

A. No, sir; I went off myself. I asked for my time myself.

Q. You were not discharged?

A. No, sir.

Q. Were you not discharged for failing to report fares.

A. No, sir; I wasn't. I wasn't discharged at all. I called for my time myself.

Q. What was the occasion of your calling for your time then?

A. I didn't feel like working here any more then. I saw the rest of the men all going before me and I wanted to go before they did discharge me.

Q. Had you been reprimanded for failing to report fares?

A. No, sir; never been anything said to me.

Q. To whom did you report when you asked to be relieved?

A. I went in and asked Graham for my time.

Q. Were those the only times, that you have mentioned, that you have been discharged or suspended since you have been employed by the Northern Pacific Railroad Company?

A. Yes, sir; I was suspended two weeks for throwing an engineer out of an engine.

Q. You have stated that before. With the exception of being

suspended once for the occurence you have stated, and being discharged again for the occurrence you have stated, you haven't been suspended or discharged while in the employment of the Northern Pacific Railroad Company.

A. No, sir.

Q. These are the only two occasions?

A. I believe that's all.

Q. Weren't you at a state of personal enmity with Bassett while you were at work in the yard here; enmity, ill feeling towards him?

A. I had nothing agianst the man only his work

122 Q. You didn't quarrel with him personally?

A. No, sir.

Q. Never have?

A. Never said nothing only while he was at work; never had a word with him outside of his business—outside of the engine.

Q. Well, you quarreled with him frequently in the yard, didn't you?

A. I did, as I stated; yes, sir. I never quarreled with him, I never done anything to him.

Q. Didn't you swear at him frequently and express ill will towards him; weren't you in the habit of doing that?

A. I was in the habit of swearing; yes.

Q. Well, weren't you in the habit of swearing at Bassett—using profane language towards him?

A. No, sir; never abused him at all.

Q. Never did?

A. I never did until the morning he called Mares a damned liar; I called him a son-of-a-bitch that morning.

Q. Prior to that morning hadn't you been in the habit of addressing profane and vulgar epithets to him?

A. No, sir.

Q. You deny it, do you?

A. Yes, sir.

Q. Who was Mares under, who was his immediate superior?

A. He was under me.

Q. You say when Mares came to work for you, the reputation of Bassett was that he was a dangerous man?

A. It was; yes, sir; among the men I had before that.

Q. Did you take the precaution at any time to caution any of the men that were under you of that trait of Bassett's character?

A. I never told them as I know of; I don't know as I ever did.

123 I might have told them to look out, had all green men; might have told them to be careful of themselves; I won't be certain.

Q. Did you ever think it was worth while to warn a single man under you that Bassett was careless in handling his engine?

A. I did one man.

Q. Who was he; what was his name?

A. His name was Brant; a new man, had never done any brakeing before.

Q. When was that you first cautioned him?

A. When he first commenced to work for me.

Q. About when was that with reference to the time that Mares got hurt?

A. He started to work for me, I believe, the day before Mares did.

Q. What did you say to him?

A. I told him he wanted to be very careful of himself; look out and not get cut.

Q. Wouldn't you have done that to a new man with any engineer?

A. I wouldn't, I don't think.

Q. Isn't switching in the yard a dangerous business with any engineer?

A. Yes, sir; you can't be too careful.

Q. There is danger always, isn't there?

A. Yes, sir.

Q. Didn't you consider it your duty with a new man that came on, to caution the man in regard to the nature of the business?

A. I didn't hire the men at all.

Q. Well, you didn't hire Mares; Mares was working under you, wasn't he?

A. Yes, sir.

Q. Just as much as if you had hired him yourself?

A. Yes, sir.

Q. You didn't think there was anything that made it necessary for you to caution Mares about the manner in which the
124 engineer did his work?

A. I might have cautioned him. I couldn't tell whether I did or not. Its hard telling what I did at that time. I used to be very careful with all my men.

Q. When Mares came on here did you know whether he had ever had any experience or not?

A. I did. Mr. Fulton told me he had worked for him before that. I used to grumble and complain of my men always to him. It was the best he could do. He used himself one night for switching and McCabe, the train-dispatcher.

Q. Isn't it a fact that there had been a number of men employed in the yard that were unskillful and dangerous to all concerned—to the engineer and to all other parties?

(Objected to and withdrawn.)

Q. Mr. Galvin, I think you stated a little while ago that you didn't consider it necessary when Mr. Mares entered the employ of the company and took a position under you, to warn him that Bassett was dangerous in his method of doing business?

A. I didn't tell you it wasn't necessary.

Q. I am asking you if you did consider it necessary to do so?

A. I understood that he was a man that had worked in the yard before.

Q. Did you understand that he had ever worked with Mr. Bassett before?

A. No, sir.

Q. But did you tell him? Did you warn him in any manner, or

did you mention to him in any way, an opinion that Bassett was a dangerous man as an engineer for him to work with?

A. I might have and I might not have.

Q. Have you any recollection of anything of that kind?

A. I used to be very careful with all of my men.

Q. If you had really thought there was anything danger-
125 ous about Bassett wouldn't you have told him?

A. I don't know but I would. I don't know but I did.

Q. It would have been your duty as a careful man?

A. Yes, sir.

Q. If you didn't tell him it would be because you didn't think Bassett was a dangerous man, wouldn't it?

A. No, sir; it wouldn't. I didn't think it; I knew he was a dangerous man.

Q. But still you didn't tell your men who were working under you, except in one instance, of that fact.

A. Well, I had a little more interest in this one man than I had in the rest of them; I will say that, and I was very careful with all of them.

Q. Didn't you take enough interest in all of your men to warn them of dangers of that kind?

A. I did; yes, sir.

Q. Any good foreman would do that?

A. I did, as nearly as I could.

Q. You would consider it your duty, if there was a dangerous engineer, to warn them?

A. I suppose so; yes, sir.

Q. You did consider it your duty at that time, didn't you?

A. It probably was my duty, of course.

Q. Well, if you failed to warn Mares, you failed to do your duty, did you, in your opinion?

A. I don't know as I did. Mares was a man that worked there before. He knew the yard.

Q. A man might work there before and not know the engineer, mightn't he?

A. I suppose so; yes, sir.

Q. Did you consider Bassett a man that was dangerous to experienced brakeman?

A. I did; yes; to a certain extent.

126 Q. You considered him dangerous to Mares, did you?

A. To a certain extent, yes, sir.

Q. Why didn't you mention that fact to Mares that you considered him dangerous to him?

A. I couldn't say whether I did or not; I can't say.

Q. Will you swear that you did mention it to him?

A. I can't be certain whether I did or not. I wouldn't swear positively either way.

Q. Will you be willing to say this from your knowledge of your duty, and as an expert, that if you did not do it you omitted your duty?

A. Yes, I will say that.

Q. You failed to do your duty towards Mares, if you didn't tell him that Bassett was a dangerous man?

A. Yes, sir; if I didn't tell him so.

Q. That would be so of any new man that came to work for you, under your charge?

A. I didn't consider him a new man.

Q. He was a new man when he came to work for you, a new man that didn't know Bassett?

A. I suppose so, yes.

Q. You speak about Bassett abusing his engine. What did he do to his engine?

A. He handled her rough.

Q. If the engine was handled rough, would there be anything about the engine or machinery to indicate it?

A. It would in time.

Q. Would it be possible to handle an engine roughly without it showing on the machinery when she went into the shop?

A. I suppose so, something. It would show more at the time on the packing of the engine than anywhere else.

Q. An engine couldn't be abused, as you say, except she would show it when taken into the shop?

127 A. I suppose so; yes, sir.

Q. Now, in respect to handling cars in the yard, in switching, that's rough work, anyway, isn't it?

A. Yes, sir.

Q. A great deal of bumping and jerking in switching cars in the yard?

A. Yes, sir.

Q. That comes from the fact cars have to be handled quickly and in short distances and stopped quickly and sharply, doesn't it?

A. There's no need of all that.

Q. I understood you to say a little while ago that switch-engines were made to stop and start quickly; that is so, isn't it?

A. Yes, sir; they're made to be quicker than another engine.

Q. That is, they start quicker and stop quicker?

A. Yes, sir.

Q. Isn't that because the necessity of the business requires them to stop quicker than road engines hauling trains?

A. Yes, sir.

Q. They wouldn't be made so unless it was necessary?

A. No, sir.

Q. Isn't it a fact that these switch-engines stop and start quicker than an ordinary engine, and consequently that makes a good deal more of a jerk in the cars?

A. Yes, sir.

Q. The cars are jerked when the slack is taken out from stopping when switching?

A. Yes, sir; you can take this slack out of them without jerking them—that is, by shutting off the steam and letting the slack go back on them.

Q. Isn't it a common thing in the yard for the slack to be taken out both in stopping and starting in switching in the yard?

A. Not without shutting off, it ain't.

128 Q. In switching isn't it true that the cars are bumped jammed around necessarily?

A. They are bumped and jammed around a good deal.

Q. Any man that knows the ways of switching knows that has to be done; isn't that true?

A. I suppose so; yes, sir.

Q. That occurs from the fact that quick work has to be done in short distances?

A. Yes, sir; that's very true.

Q. Cars are constantly back of the engine and on the other end?

A. Yes, sir.

Q. They have to be moved fast between those and stopped quickly in order to prevent a collision?

A. Yes, sir.

Q. Any man who does any business in the yard knows that, doesn't he?

A. He does, I suppose.

Q. And in switching a great many draw-heads are knocked out in the yard, are they not?

A. Yes, sir.

Q. A good deal of that business, inevitably?

A. Yes, sir.

Q. Cars are broken up a good deal?

A. Yes, sir.

Q. Did you ever while you had charge of the yard break any cars?

A. Not but once.

Q. You did break cars once; it was probably inevitable, wasn't it?

A. I didn't break them.

Q. I am not charging you with any blame.

A. I say I didn't break them.

Q. It frequently happens in switching in the yard that cars are broken inevitably?

129 A. They weren't broken by switching.

Q. They are frequently broken in switching; draw-bars?

A. They are; yes, sir.

Q. So that the process of switching in the yard is one of bumping and jerking a good deal, isn't it?

A. Yes, sir; it is, more or less.

Q. It is more than it is on the road; that's the reason why the engines are made so as to stop and start a good deal more rapidly?

A. To get the work done quicker, I suppose.

Q. In a big yard like Fargo and particularly in the fall of 1881, there was a good deal of business to be done?

A. Yes, sir.

Q. A good many cars in the yard in proportion to the trackage, wasn't there? A large quantity of business in proportion to the trackage to do it on?

A. The amount of room?

Q. Yes, sir; according to the amount of track room?

A. Yes, sir.

Q. Now, it was necessary wasn't it during that fall to be very prompt and quick in shifting cars in order to get the work done?

A. It was; yes, sir; with the help that I had.

Q. With the help that you had?

A. Yes, sir.

Q. And the amount of help you had was perfectly visible to yourself and Mr. Mares or anybody else, wasn't it?

A. Perfectly which?

Q. Visible; Mr. Mares could see the number of men you had in any crew?

A. Yes, sir.

Q. Was there any man in your crew who didn't know how many men there were at work?

A. I don't think there was.

130 Q. And any man at work at that crew could see the manner in which business was being done, could he?

A. Yes, sir.

Q. Now, you speak about it being the duty, in such a yard as this, of an engineer that's handling cars to attend to the signals of the brakemen?

A. Yes, sir; not to be asleep—to be awake.

Q. That don't relieve him of the duty of looking out himself?

A. No, sir.

Q. He still has got to see; it is his duty to see that he don't get into dangerous places; it is his duty to be watching out all the time and not rely wholly upon signals?

A. It is his duty to rely upon signals and nothing else at night; daytimes a man can see; at night his duty is to go by signals and nothing else.

Q. Isn't—his duty, in addition to signals, to see he don't run onto any obstructions?

A. It is his duty to obey the signals; it don't make any difference.

Q. Isn't it his duty to be cautious himself in handling his engine? That's what I speak of.

A. Of course it is.

Q. Now, supposing a case where these cars were being backed up by the engine, a signal was given the engineer to back, was he bound under the rules of the yard or rules of railroading anywhere to back at any given rate of speed or was he master of that himself?

A. Bassett used to be master of it; yes, sir.

Q. Wasn't he the rightful master of it?

A. He always tried to be master of it.

Q. Wasn't that true of any engineer?

A. No, sir; it wasn't. I switched here with men I could do twice the work with I could with Bassett.

Q. Would any engineer be under any obligation if he was

131 signaled to back, to continue backing at any rate of speed?

A. No particular rate of speed.

Q. Wasn't he justified in moving at such a rate of speed that if a collision would happen no injury would be done?

A. I don't know as it was; it wasn't his duty to expect a collision at all.

Q. Collisions happen in the yard, don't they, very frequently?

A. Very seldom that I have seen.

Q. In moving cars from one side track to another they are liable to bump hard?

A. If he don't watch out.

Q. Supposing he thought he was moving too rapidly, hadn't he a right to check the motion of his engine and cars?

A. If he thought he was going too fast; yes.

Q. It was his duty to do so, wasn't it?

A. I suppose so.

Q. So while it was his duty to continue backing he was not required to go at any particular rate of speed—if he thought he was going too fast he had a right to check it and go slower?

A. To a certain manner; he had no right to jerk things to pieces.

Q. He had a right to check it?

A. To a certain extent; yes, sir.

Q. If, in his opinion, he thought he was going too fast he had a right to check the speed, hadn't he?

A. To a certain extent.

Q. Without any signal from anybody?

A. No, sir; not if the men were there to give signals.

Q. Will you answer my question?

A. I will if I think it's right.

Q. If any engineer, I won't say Bassett, if an engineer with a switch-engine in moving cars in the yard—for instance, backing up—and thinks he is going too fast at any particular time, hasn't he
132 a right to check his speed and go slower if he thinks so himself and without waiting for a signal from anybody?

A. It's a very careless piece of business—doing it without getting a signal.

Q. I am asking you if a switch engineer, when he is moving cars in the yard, thinks he is going too fast, if he hasn't a right to check that speed and go slower?

A. Bassett had, I suppose; no other man had.

Q. Just answer the question.

A. I said to a certain extent he has.

Q. You mean to say yes, do you?

A. To a certain extent, I do; yes.

Q. Now, what extent do you mean?

A. He could reduce that speed by shutting the engine off, not reversing her.

Q. Suppose, in this case, it should turn out this engine was shut off before she was reversed; he had a right to do that, hadn't he?

A. Yes, sir.

Q. In other words, the engineer has control of the power; he has control of the rate of speed at which he shall move his engine and cars. The brakemen don't have any charge over that?

A. That's very true; he is running the engine.

Q. I would like to have you explain to the jury, a little better than it has been done, in order that we may understand precisely what happened on that morning, the relative positions of the tracks in this yard—three and four and five. Those tracks, as have been stated by Mr. Mares, did begin east of Broadway. Now, they do not begin at equal distances east of Broadway, do they?

A. No, they are in different places.

Q. For instance, track three; that begins a certain distance east of Broadway; how far?

A. About six car-lengths.

133 Q. That would be about 200 feet—for a 33-foot car 198 feet—about 200 feet east of Broadway.

A. I couldn't state exactly.

Q. Number three branches off from what track about 200 feet east of Broadway?

A. Number two.

Q. Then it runs east about how far before another track branches off from that?

A. Number two connects that much west.

Q. How far east does number three go from Broadway, how far from where it starts from number two, before some other track connects with them?

A. Number three don't connect with any other track until you get down to the lower end of three.

Q. Isn't four connected with three?

A. There is four, five, and six.

Q. They are all connected?

A. They are when you put them in such a manner.

Q. The switch that reverse track number three is about two hundred feet, or six car-lengths east of Broadway; then how far do you go on number three before you find any switch on number three connecting any other track with it?

A. Well, three connects with four.

Q. Now, about how far east; connects with four, a switch?

A. Yes, sir.

Q. About how far west of three—the first you mentioned?

A. About two car-lengths, I think it is. Let's see, from the switch that throws number three over to the switch that throws number four over is about three or four car-lengths?

Q. Then you go still further on number four before you reach the switch that connects number five?

A. No, sir.

134 Q. How is number five connected?

A. Connected with a three-throw switch; four, five and six, those are all there together.

Q. That is probably about four hundred feet east of the first switch where three connects with two?

A. Yes, sir.

Q. How far apart, sideways, are those switches from each other—three, four and five?

A. Far enough to clear anything.

Q. Aren't they a good deal further, there?

A. No, not much; there ain't much of a space; I could not say. When cars are standing there, between them is a space probably of ten feet at places; it is less at places.

Q. They spread out down there, don't they?

A. They spread out according as you go further east.

Q. And these tracks all lay on the north side of the main track, don't they?

A. Yes, sir.

Q. Number one next north of the main track; number two next north of No. one, number three next north of number two, number four north of number three, five next north of number four. Well, now after you get down there some distance on number five you are a good ways from number three, aren't you?

A. Yes, you are quite a distance.

Q. Spread out so they're a hundred feet or more apart, don't they?

A. Yes, down near the tank there.

Q. Here, this side of the tank, after on get two or three hundred feet down there on five, you are 75 or 100 feet north of three, aren't you?

A. No, sir; not until you get to the tank. They run in about even until you get to the tank, then they spread out; there's a curve there going down the hill.

Q. This particular morning when Mares got hurt you say
135 you had a lot of cars on three?

A. Yes, sir; also on five.

Q. What were those cars on three?

A. Part of a train going west; making up to go west; No. 11.

Q. Those cars had come in on some train from the east?

A. Yes, sir; they had been switched during the fore part of the night; was cut out to go on number eleven.

Q. As I understand you to say, some trains were expected in and you were in a great hurry that morning?

A. Yes, sir; I wanted to get through with my work.

Q. It was necessary to move very promptly, wasn't it?

A. Yes, sir.

Q. How many cars did you have to move, altogether, to make up the train you wanted to get ready?

A. I couldn't say; my principal thing was to make room for other cars.

Q. You had to make up a train and get other cars out of the way before some other train should come in?

A. No, to get other cars out of the way that was on that train coming in.

Q. Now, all of your men with you understood you would have to work promptly to get through what work you had to do in the time you had to do it

A. I didn't tell them nothing only to back onto this track.

Q. Did you tell Mares to hurry up?

A. I told him to hurry; yes, sir.

Q. Did you tell him the reason why it was necessary to hurry up?
A. I don't know but what I did; I guess I did.
Q. You explained to him that you had to get out of the way of another train?
A. I think I did; yes, sir.
Q. Of course you don't know what Mares told Bassett?
136 A. I don't know; no, sir.
Q. He might have told him the same thing you told him?
A. Probably did; yes, sir.
Q. That is, that it would be necessary to do sharp work?
A. I couldn't say what he did tell him.
Q. That was the fact; it was necessary to do sharp work to get done what you wanted to get done?
A. Yes, sir.
Q. Now, you say there were three cars on three you wanted to take out of three and set over on five?
A. No; I wanted to keep them in their proper place in that train.
Q. In order to accomplish that you had to take them off from three and set them back onto five?
A. Yes, sir.
Q. Those three cars you wanted—you wanted for a particular purpose, did you?
A. Yes, sir; for a point west of here; wanted to keep them in the proper place in the train.
Q. Did those three cars you wanted happen to be the first three cars standing on three?
A. It happened I put them in there; I had switched the train before. I wanted to keep them so. They didn't happen there; I put them there.
Q. They were there, so you had no occasion to move out any other cars?
A. Yes, sir.
Q. You are sure about that, are you?
A. I know it; yes, sir.
Q. When you came down the yard, as I understand you say, you went and waked up the crew that were asleep in the office?
A. Yes, sir.
Q. One of which was Mares?
A. Yes, sir.
137 Q. Now, after you had aroused them and started down the track, I understood you to say you sent him back to get Bassett with the engine to come down, and you kept right on, did you, swinging the switches?
A. I went right along down.
Q. What do you mean by swinging the switches?
A. Placing them for the track I wanted to go on.
Q. You had to place the switches so that the engine then on the hotel track could go onto track three?
A. Yes, sir.
Q. That is one of the switches?
A. Yes, sir.

Q. You didn't place any switches connecting from three onto five?
A. No, sir; I didn't. I placed it so we would back down onto three first.
Q. So they would connect to get into three from the hotel track, to get these cars out?
A. Yes, sir.
Q. What did you do then?
A. Cut those cars off when they got backed down and coupled onto them.
Q. These cars you wanted there were set in with a number of other cars?
A. Yes, sir.
Q. So they had to be cut off?
A. Yes, sir.
Q. What were you doing after you cut those cars off?
A. I don't know what I was doing.
Q. Where were you?
A. I stood right where I cut them off.
Q. How far was it necessary to move those cars west before they could get off from three onto five?
A. About five or six car-lengths. I should judge it was that.
138 Q. That is, you were about five or six car-lengths east of the switch?
A. Yes, sir.
Q. And the train had to move entirely west of the switch and then come east again?
A. It had to pull up over the switch and back east of the switch.
Q. Were you expecting the engine down to take out any more cars?
A. Not on that track.
Q. What were you expecting to do next?
A. To back down and shove the cars all down on number five?
Q. Expected the engine then to return to number three?
A. No, sir; I expected the engine to back down on number five.
Q. You were not expecting them to come back to three at all?
A. No, sir.
Q. What did you do next?
A. Had to push them all down on five?
Q. After you had uncoupled the three cars you mentioned from the others standing on three, you were there at three?
A. There at three; yes, sir.
Q. Where were you expecting to go then?
A. On five.
Q. How were you expecting to go—walk over or ride over?
A. I was right close to five.
Q. How far were you from five?
A. I wasn't but a very short distance—not any further, much, than from me to you.
Q. Ten feet?
A. It was right opposite five I cut the cars off.

Q. When was it you had been checking up the yard that night?
A. Oh, about an hour before that.
Q. You had finished checking the yard at that time?
A. Yes, sir; checked all through the numbers; made out my switch list; had nothing to do then but simply place the cars
139 in position and switch this other train that was coming in, and finish making up number eleven.
Q. Were you observing the movement of these cars that were taken out? Were you looking at the movement of these three cars?
A. No, sir; I was not.
Q. Which way were you looking—what were you doing?
A. I don't know which way I was looking. I think I was walking right on down.
Q. You walked right on down and these cars were back of you?
A. They were back of me; the switches were all set for five.
Q. Did you set those for five or somebody else?
A. I seen them. They were set. I might have done it or somebody else might have done it.
Q. The three cars to be taken from three to five would have to go further east than they were on three?
A. They would; yes, sir.
Q. About how much further east?
A. Well, there was quite a little room; ten or fifteen cars—probably more; I couldn't say for sure how much room. The end this way of the cars this way stood near the lumber-yard switch that that turns off from five; that's where the end of the cars were that were standing on that track. There must have been fifteen car-lengths of room from the time you struck five until you got to the cars.
Q. That would be about a block and a half with the street, wouldn't it—about 450 feet in length.
A. About fifteen car-lengths.
Q. You went ahead down there, did you?
A. Yes, sir.
Q. Your duty was down where those cars were going?
A. My duty was wherever I was a mind to be.
Q. At that particular time you wanted to be down there?
A. If I felt like going there; I was moving down that way.
140 Q. As soon as these three cars were cut off you started down east, didn't you?
A. I may have started; I may not have started immediately; that's where I was moving. I had the switch list in my hand; also looking at the switch list.
Q. You had a lantern with you?
A. I did; yes, sir.
Q. You were not attending to these three cars?
A. I wasn't watching the cars at all.
Q. The cars were at your back, then, when you were moving?
A. They were; yes, sir.
Q. Now, about how far east had you gotten from where you cut off the three cars when you first heard the cry?

A. Well, not but a short distance from where I cut them off until I heard him holler; probably not more than four or five car-lengths.

Q. Well, was it east of where you cut them off?

A. It was east of where I cut them off; yes, sir.

Q. About four or five car-lengths east of where you cut them off?

A. Yes, sir.

Q. You had gotten still further down east than where you had cut them off?

A. Yes, sir; than where Mares fell off. I was about three or four car-lengths east of him.

Q. You were walking down east toward the cars on five and you heard Mares cry and he was three or four car-lengths back of you?

A. Yes, sir; he was three or four car-lengths further west.

Q. At the time you had got to where Mares was, was the train still or not?

A. It was, I think.

Q. At the time you got to where he was the train was stopped?

A. I believe it was.

Q. He was lying pretty near the engine, wasn't he?

141 A. Yes, sir. I think I got to him about as soon as the other men. I ran right up as fast as I could go.

Q. At that time where was Bassett standing?

A. I don't know; in a short time afterwards we were all around him. I couldn't say; I don't think they were, any of them, there when I got there. I think I was about the first man that got to Mares.

Q. Wasn't he at that time lying right opposite the engine?

A. Yes, sir; right near.

Q. And wasn't Bassett down on the ground by him?

A. No, sir; he wasn't. I think I was the first man that got to Mares; the first man that took hold of him, anyhow.

Q. By the time you had gotten there the engine and cars were stopped?

A. Yes, sir; everything was still.

Q. Bassett got down in a moment, didn't he?

A. Yes, sir; all there in a short time.

Q. Mares had his full consciousness?

A. He did, apparently; yes, sir.

Q. He knew what was going on?

A. He did, apparently; yes, sir.

Q. How long did he lie there before he was taken up?

A. It was a short time, just while they were disputing.

Q. Well, about how long, in minutes I mean?

A. Not more than three or four minutes; four or five.

Q. When he was taken up was he taken up on a car door or stretcher or anything of that kind?

A. I think not; no, sir.

Q. He wasn't.

A. I don't think he was. I think we lifted him right onto the front of the engine. I think we put him onto a car door or stretcher

up above on the truck. He laid there a good while before they would permit him to go into the hotel.

142 Q. The railroad men went to the hotel and tried to get admittance for him and they wouldn't let him in?

A. The night clerk wouldn't let him in. I woke Mr. Fulton up.

Q. You did get in afterwards; some minutes afterwards?

A. We got him in the hotel.

Q. The proprietor admitted him some minutes afterwards?

A. Yes, sir.

Q. While you were waiting for him to be admitted he was lying on the stretcher?

A. He was on the express truck. I know I got an overcoat to put over him.

Q. He must have been lying on a stretcher on the truck?

A. I don't know. I wouldn't be certain but what he was laying on a door or something; he was probably laying on something.

Q. Do you remember distinctly that the door or whatever he was on was gotten only when you got up and put him on the truck, or whether it was gotten before?

A. I don't remember whether it was gotten before or not.

Q. Considerable excitement among all of you?

A. There was; yes.

Q. Considerably shocked, were you?

A. Yes, sir.

Q. Perhaps there might have been some of the circumstances you didn't attend to?

A. No, sir; there was not; anything I could do at the time I done it.

Q. While you were talking with Mares I would like to have you tell me and tell the jury precisely the words that were used; what did Mares say and what did Bassett say?

A. Mares, as soon as he seen Bassett, said, "If you had paid attention to my signal this would not have happened." Bassett says, "I did pay attention to your signals." Mares says, "You didn't."

143 Bassett called him a damned liar and then says I, "You son-of-a-bitch, I will tramp you into the ground." I went for him and I would have done it.

Q. Did Mares say anything about any sudden checking of the speed of the train?

A. Not that I know of.

Q. Not a word of that kind said?

A. Nothing; only about signals.

Q. Did you see Mares after that at any time?

A. I never have seen him at any time; well, I was in his room once while he was in the Headquarters Hotel, for a short time.

Q. Did he complain——

A. I did not stay long enough for him to complain at all.

Q. At that morning after he was hurt did he complain or charge at any time that the speed of the train had been unduly checked?

A. Nothing; only what he said to Bassett at the time.

Q. Said Bassett badn't obeyed his signals?

A. He said if he had obeyed him it wouldn't have happened.

Q. He said nothing about the speed of the train?

A. Not that I heard, at all.

Q. Did Bassett remain with him after he was hurt, while he was down at the hotel on the steps?

A. No; he didn't. We went to Moorhead, I believe, for the doctor; as near as I can recollect, went over to Moorhead for Dr. Kurtz and Bassett also.

Q. You were along, were you?

A. I was along; yes, sir; that is, to the best of my belief, we went to Moorhead after we left him there.

Q. You first brought him up and put him on the steps before you went to Moorhead?

A. And put him on the truck.

Q. Bassett was along then, wasn't he?

A. Yes, sir.

144 Q. Helped to put him on the truck, didn't he?

A. He assisted; yes, sir.

Q. About how long did you remain there before going over to Moorhead?

A. I couldn't say how long we did stay there. I couldn't say whether we went to Moorhead before we took him upstairs or after. The first thing I done was to wake Mr. Fulton up and tell him what had happened. Whether we went to Moorhead before we took him upstairs or after, I can't say.

Q. Now there's one more fact that occurs to me in regard to practices in yards. Is it customary to use the brakes for checking the speed of freight cars in switching in the yard?

A. No, sir; it is not customary to use the brakes. There is times they do use them. You take old timers, men that have been doing yard-work, working about the yard any length of time—they use the brake as little as they can help in the yard.

Q. Stopping the cars is done by the reversal of the engine?

A. That's the way they stop.

Q. That is the practice in the yard, to stop the speed of the cars by the reversal of the engine?

A. Yes, sir; but not in the manner he did.

Q. I am not asking you about that. That is the practice, is it?

A. That is the practice they have, to reverse them, or else let them go until they stop themselves.

Redirect examination by Judge WILSON:

Q. Mr. Clough asked you about your being discharged by the Manitoba Company; that was a fact, wasn't it?

A. Yes, sir.

Q. What was the cause of it?

A. A tail-end collision.

Q. State what that means.

145 A. One train running into the tail of another.

Q. You were conductor on one of those trains?

A. The head train; yes, sir.

Q. A train ran into you from the rear?

A. Yes, sir.

Q. And you were blamed by some of the railroad employés for being culpable in that?

A. They blamed me to try to make out that it was my fault so as to clear themselves.

Q. Were you tried for that?

A. Yes, sir.

Q. Did a jury acquit you?

A. Yes, sir.

Q. Immediately after that acquittal this Northern Pacific Company employed you?

A. Yes, sir.

Q. Kept you along ever since, as you have spoken of?

A. Yes, sir.

Q. Where were you tried?

A. At Breckenridge.

Q. They knew all about it, did they; it was a matter that was notorious?

A. They ought to have if they didn't, if they read anything.

Q. You say you were blamed by some of the officers for the purpose of drawing the blame from themselves?

A. Yes, sir; no fault of mine whatever; proven so.

Q. Then the counsel asked you about being discharged here by the Northern Pacific Railroad Company; were you ever discharged by the Manitoba Company save that time?

A. That's the only time I ever was discharged by the Manitoba Company.

Q. Now, then, about your discharge by the Northern Pacific
146 Railroad Company; when was the first time?

A. Well, I was suspended.

Q. For how long?

A. For ten days.

Q. What was that for?

A. Well, I was doing switching in the upper yard here, and an engineer by the name of —— —— he was with me. He was some such man as Bassett, if not worse; he was as bad anyhow, or very near it. I gave him signals to back up so far. I was making the couplings myself. He came back against the cars very hard and the draw-bars slid by each other; instead of coming together like that they went by each other.

Q. Was that on account of backing up so hard—coming so hard?

A. Yes, sir; and I was caught in there. As soon as I got out I come up to the engine and threw him off the engine and sent to the round-house to get another engineer; they blamed me; they didn't blame me any for hitting him, anything of that kind; but what they blamed me for was getting onto his engine; I had no business going onto his engine and putting him off.

Q. They didn't blame you for hitting him?

A. No, sir.

Q. Did anybody ever pretend you were doing wrong in doing what you did?

A. No, sir; nothing wrong only in getting on the engine.

Q. Was it very perilous to you, his doing what he did there?

A. Yes, sir.

Q. You felt that it was endangering your life right then and there?

A. Yes, sir.

Q. That's what you were suspended for?

A. Yes, sir.

Q. For how long?

A. For ten days.

Q. They took you back immediately?

147 A. Yes, sir.

Q. Put you at what?

A. The same business—yardmaster.

Q. Kept you right along at it?

A. Yes, sir.

Q. Were you ever again censured for anything by that company?

A. Yes, sir.

Q. What for?

A. I got into trouble with a couple of brakemen.

Q. What about?

A. About some cars on the side track. They were building scales down here, and there was a train run at that time from here to Casselton and Mayville—from here to Casselton and then to Mayville. I used to always make up the train that went east in the morning, the number two passenger. This mixed train that went out on the Casselton Branch, I used to make that up on the tracks. I used the Headquarter's track, the track on the south side. While they were putting in scales there that didn't leave me as much room as I had before that, and times I would not have any too much room with the cars there. They would clear everything, clear the coaches I brought down from the shops. This train came in from the west—they had some baggage to transfer, some stuff that was going to Crookston. The train pulled up there and stopped near the cars. The brakeman got off and claimed the cars wouldn't clear; he wouldn't pull up any further. I told him they would clear; they disputed me. I gave the engineer the signal to pull ahead; the brakeman came to me and wanted to know who was running this thing. I told him I was. He said he didn't think I was, if he knew himself, and him and I got into a fuss. I knocked him down a couple of times. His brother was the other brakeman; he came to me and we both got to fighting and the policeman separated us, and then after they had pulled up and transferred the baggage into the passenger train they were backing up to side track their train. I was getting on

148 the rear end of the hind car to ride back to take the check of the train, to take the numbers of the cars, and this brakeman on top kicked at me. I thought the whole thing was settled. I got off and followed him back into the caboose, broke the caboose in, took him, and had a fight in the caboose.

Q. You gave the signal to the engineer of the train of cars to go ahead?

A. To go ahead; yes, sir.

Q. Was it your place and duty and power to do so?

A. That was my power; he was under me when he got into the yard.

Q. You had a right to do that?

A. Yes, sir.

Q. This brakeman came up and claimed you had no right to, and you got into a discussion on that?

A. Yes, sir.

Q. Was there anything else about that save what you have told—about your dismissal or suspension then?

A. I didn't go to work that night at all; I celebrated the 4th of July; I didn't go to work at all. The next day I came around and seen Mr. Hobart—he was our superintendent at that time—and he blamed me for doing what I done, and he said he thought I was a man that never used liquor. Well, I never used to let liquor get the best of me at all—I never did. He said he would have to lay me off. I got mad and wouldn't take any lay-off—I would go.

Q. He didn't propose, then, to dismiss you?

A. No; he said he would have to make an example of me for doing what I had.

Q. How long did he propose to lay you off?

A. I don't know—a couple of weeks, I suppose. Lotz was the man had changed—had another agent.

Q. Were you ever back with this company after that?

A. Yes, sir.

149 Q. How soon after?

A. In about 7 weeks.

Q. What did they give you to do then?

A. Sent me to Jamestown.

Q. To do what?

A. To clean up the yard.

Q. Explain that.

A. Well, there is very little room at Jamestown. They had had two or three men there doing the switching; they didn't get the work done; had things all mixed up. They were building a road from there then—the Jamestown Northern, construction station and general station—and everything also was mixed up. The men there were new men; hadn't had experience in yard work and couldn't do it. I was around the office, and McCabe asked me one day if I wanted to go to work, and he told me I could go to Jamestown if I wished; he would like to have me go there, being as they were troubled so with the men there.

Q. In other words, they asked you to go to Jamestown and straighten up that yard for them and get business in shape, and you went there?

A. I went there; yes, sir.

Q. What then?

A. After I got the yard in good shape and everything they set me running a freight.

Q. Was that promotion or degradation?

A. It was considered a better job; the salary was more.

Q. They promoted you after that?

A. Yes, sir.

Q. When you last left, I understood you, all the men were stopping. What was the reason of that?

A. Well, they were discharging them.

Q. Was there a new superintendent come on here then?

A. Yes, sir, and he was bringing his own men with him.

150 Q. And you stopped?

A. I took a tumble and quit.

Q. What do you mean by that?

A. I thought I would take advantage of them—would not have them discharge me.

Q. You went in and called for your time and stopped?

A. Called for my time and stopped; yes, sir.

Q. The counsel asked you about your being on ill terms with Bassett; is that so?

A. No, sir; never.

Q. Had you ever an unkind word or unpleasant word with Bassett, except when you spoke to him in the yard under you, about doing the business you spoke of?

A. No, sir; I never abused him then.

Q. Did you ever have an unkind word or expression; were your relations unkind?

A. No, sir; they were not; I am quick-tempered, it is very true, but I won't abuse a man or anything of that kind unless he is deserving of it.

Q. You have said in the yard that you had spoken to him about doing business—jerking and tearing around, as he did. Was it or was it not your duty to explain to him and caution him and reprimand him for those things?

A. It was; I used to go to him and speak kindly to him. I found out I could get more by coaxing him than I could by scolding. I used to coax him at times. I could get more out of him that way than I could by being anyways harsh with him.

Q. Well, except in doing what your duty required you to do—telling him about his misdeeds—was there anything else between you and he?

A. Nothing whatever.

Q. Are you and he always on friendly terms?

A. Always speak whenever we meet.

151 Q. Is there any unfriendliness between him and you?

A. No, sir; nothing that I know of—that is, on my part there ain't.

Q. Now, if you knew that Bassett was a reckless and careless and dangerous man in his manner of doing business in the yard there, was it or was it not your duty as yardmaster to report that to your superior?

A. It was my duty.
Q. Did you or did you not do it?
A. I did; yes, sir.
Q. What do you mean by abusing your engine?
A. Well, by handling her rough and quick.
Q. Was that handling it quick dangerous to the men?
A. It was, using full force of steam.
Q. That is what you mean by abusing the engine?
A. Yes, sir.
Q. Who is the man here who has charge of all the engines and of all the cars—is the head man in that matter?
A. Mr. Rupert.
Q. He is in the employ of this company still?
A. He is.
Q. And is here at present?
A. At present; yes, sir.
Q. He is master mechanic here?
A. Yes, sir.
Q. Now, the counsel asked you whether it is not customary in the yard to reverse an engine, and you say it is, under certain circumstances?
A. Yes, sir.
Q. Explain to the jury just what the custom is to do and just what the custom is to do it.
A. Well, when an engineer receives a signal to stop it is his duty to shut off the throttle—that is, the part for using steam; then reverse his engine after he shuts off the steam.
Q. Shutting off the throttle—that is, taking the steam off
152 which makes the wheels move?
A. No, sir.
Q. After you shut off the throttle then it stands without any power pushing it one way or the other?
A. Yes, sir.
Q. Just keeps its own motion, going slower and slower and slower until it stops?
A. Yes, sir.
Q. You say that's the practice?
A. Yes, sir.
Q. Then if he wants to stop any faster than that after that is done then he can reverse?
A. Yes, sir; then after he reverses he can use steam.
Q. But is it customary in this or any other yard you ever knew, or is it safe for a man to reverse in the manner or with the suddeness that this was reversed that night?
A. No, sir; it ain't necessary, and I never seen it done that way.
Q. Well, is it safe for those about the cars at night?
A. No, sir; it is an improper way of checking without he has got a signal or sees something himself to do it for.
Q. Well, now, if he wanted to stop would that be a proper way to do that unless there was some risk of a collision?
A. No, sir; it wouldn't.

Q. Would it or would it not be a dangerous way if he wanted to go slower than he was going?

A. Very dangerous.

Q. Is it or is it not usual to slow if he thought he was going too fast in that way?

A. That ain't the way they do; no, sir.

Q. Now, in the night time, about the engineer, how is he guided—by signals altogether?

A. Altogether by signals.

153 Q. Would it be possible for him to see back of the train in the night time, when it was as dark as it was at that time—to see whether there was anything in the way or not?

A. Well, there is a headlight on the back of the engine, but he couldn't see behind the cars.

Q. A person on top of the cars where Mares was could see everything behind?

A. He could see; yes, sir.

Q. Was it his duty to give those signals, and was it the duty of the engineer to obey those signals and those only; and if he was running too fast and ought to go slower, would it have been a safe or prudent thing for him to do what he did that night?

A. No, sir.

Q. It wouldn't?

A. It wouldn't be safe; it would almost jerk a man off that was expecting it.

Q. You say, while you don't think you were looking at it, the fact that it was done in such a violent manner arrested your attention in an instant?

A. That's what attracted my attention.

Q. Do you remember whether any of the men here left the road on account of fear of Bassett?

A. There was men quit here.

Q. Well, on account of fear of being injured by him on account of his reckless manner?

A. There was men that wouldn't work; they quit at that time of the year; they were quitting because they could make more elsewhere—harvesting and threshing and one thing and another.

Q. I am not asking you about that. I am asking you if any of the men quit the road because they were afraid of being hurt or injured by Bassett's mode?

A. There was a man of mine quit after Mares was hurt.

154 Q. How soon?

A. The next night.

Q. Was it on that account?

A. He was afraid of Bassett; afraid of the engineer.

Q. Was there any other?

A. Not to my knowledge; no, sir.

Q. Counsel asked you what Mares said after he was hurt—about the speed of this train. Have you given all that you remember that Mares said when he was lying on the ground there when you came to him?

A. I don't know as he said anything about the speed at all.

Q. Have you given us all that you remember that he said while he was lying on the ground when you found him immediately after he was hurt?

A. I believe so.

Q. When you took him to the hotel it was some time before you could get him into the hotel—about how long?

A. I don't know; it was over half an hour.

Q. You were around there until he was taken into the hotel?

A. I was; yes, sir.

Q. Did he, after the time he spoke, just when the accident occurred, prior to the time he was taken into the hotel, say anything more about this, according to your best recollection?

A. Not that I remember of.

Q. You don't remember a word?

A. No, sir.

Q. After that time up until this suit was commenced, do you remember of ever hearing him say anything about it? Do you or do you not?

A. Well, I met him once since he was able to get around outside, but I didn't have any conversation with him concerning the case at all.

Q. Up until that time you hadn't met him after that night at all?

A. No, sir.

155 Q. You saw him at the hotel once, you said?

A. Upstairs, after he got hurt.

Q. Did you speak to him about this, or did he say anything to you about it?

A. He did not. His mother and sister and a man by the name of Charley was —— in the room, and I just merely went in to see him. Really, I couldn't stay in the room.

Q. Why not?

A. I don't know; the stuff he was using on his feet; I couldn't stay in the room with it; I couldn't look at his feet.

Q. It made you sick?

A. I could not stay in the room; I had to go out.

Q. Looking at his feet, you say?

A. His mother was using cold water on his feet; I just merely set there and spoke to him—asked him how he was getting along; that was about all. I didn't see him from that time until he was able to get around himself.

Q. Do you remember how long Bassett had been engineer before Mares was hurt?

A. I couldn't be positive how long; he had worked for me some time I know.

Q. Do you know whether he had ever been an engineer before he was engineer in that yard?

A. No; that was the first time after he was firing.

Q. That was the first he did after he was fireman?

A. Yes, sir.

Q. And the first he did as engineer was under you in that yard?

A. No; I believe he worked under a man by the name of Glenn—that is, he was under Baker—Glenn was his foreman. For sometime after he got set up he worked daytimes altogether.

Q. Do you know how long that was before Mares got hurt he was made engineer from being fireman?

156 A. Not, I should judge, more than four or five months.

Q. Which does it require more carefulness—to run an engine on the road or in the yard—for the safety of the men?

A. Well, for the safety of the men a man in the yard has got to be very careful—more careful than a man running on the road, and it takes more of an expert to run an engine on the road.

Q. Why so?

A. Why, in case anything happens—the machinery gets out of gear, anything gets broke, or anything—it requires more of an expert; here you are right here at the shops.

Q. As to carefulness and prudence, which requires the most for the safety of the men—a yard engineer or a road engineer?

A. Well, in regard to train orders, and one thing and another, a man has got to be pretty careful on the road to avoid collisions; a man has got to be a good man before he can go on the road, but in regard to signals in the yard you are required to be more attentive.

Recross-examination by W. P. CLOUGH:

Q. At the time you recently quit the employment of the Northern Pacific Railroad Company, is it not true charges were pending against you for failing to report fares as conductor and other similar irregularities?

A. There was no charges made to me at all.

Q. You were expecting charges to be made against you upon those grounds?

A. Well, I carried a man—yes, sir; against the rules of the company not to carry passengers.

Q. You understood charges were being made against you by officers of the company for irregularities as conductor and you resigned before the charge was formally made?

A. Yes, sir. Now, I will explain that.

Q. To come back to the time of this occurrence, did you

157 see anything that was done in that engine or did you judge from the sound?

A. I judged from the sound; I didn't see.

Q. Did you hear the engine reversed more than once while those three cars were being moved?

A. I heard—she was swung ahead and then she was reversed back again.

Q. That is, you only heard her reversed back once?

A. That's all, and ahead once.

Q. She was reversed back before she was reversed ahead?

A. No, sir; she was working back.

Q. The reversal you speak about as being the wrong one was backward or ahead?

A. Swung ahead; she was in her back motion, working steam, when he swung the reverse lever over ahead.

Q. It was the reverse to go ahead that you say was improper?

A. That attracted my attention.

Q. How did it attract your attention?

A. By the exhaust and the way she slipped.

Q. What did you do?

A. I looked around.

Q. Did you keep on walking east?

A. No; I didn't. I heard a man holler and run right up there. I seen a lamp fall; I didn't know the man fell. I didn't see the man at all.

Q. You didn't look around quick enough to see the man?

A. I seen the lamp.

Q. Were the cars still moving when you looked around?

A. They were.

Q. How soon after that before they stopped?

A. Well, they had run not more than two or three car-lengths.

Q. And then stopped?

A. Then stopped. When I got up to where they were the man lay right near the engine.

158 Q. You didn't look around quick enough to see the man fall?

A. I couldn't see; it was night. He might have fallen during the time I looked around. I saw the lantern fall.

Q. Which way did the lantern fall?

A. It came right down; fell right down near the center of the track—in the center or, probably, on the side.

Q. It fell right down inside the tracks, did it, apparently?

A. Yes, sir.

Q. As if it had fallen from the end of the car?

A. Yes, sir; as if it had fallen from the end of the car.

Q. Supposing a man had been supporting himself there upon the brake-beam, or anything else, would such a reverse as you speak of have thrown him down?

A. If he was holding onto anything he would have something to hold onto.

Q. Don't you consider it dangerous to ride upon the top of cars in switching without some support?

A. Well, it is in one respect; yes, sir.

Q. Brakemen ordinarily are in the habit of exposing themselves to danger frequently?

A. Yes, sir.

Q. In the habit of stepping on and off engines?

A. Yes, sir.

Q. Right in front of them; it is customary in all yards; in other words, they are in the habit of putting themselves in danger frequently?

A. Yes, sir.

Q. Get hurt frequently, don't they?

A. Yes, sir.

Q. Numerous accidents occur in this yard, and all yards, don't they?

A. I don't know of many in this yard. I know of no other man that got hurt with me.

159 Q. Isn't it true that in railroad yards men get hurt frequently?

A. Yes, sir.

Q. After you had gone up to the Headquarters' Hotel was you by the side of Mares all the time?

A. I was rustling around. I believe I went to get his overcoat.

Q. Who staid with him when you were away?

A. John McLean staid with him from the time he was hurt until the next day noon.

Q. Wasn't Bassett with him?

A. No, sir; I don't think he was.

Q. While you was in the house trying to get him in and getting his overcoat, wasn't Bassett with him?

A. He might have been; yes.

Redirect examination by Judge WILSON:

Q. During your experience in this yard you say you know of no other man being hurt but one, and that man was hurt by Bassett?

A. He was hurt; yes, sir.

Q. In breaking in the yard it is a dangerous business, anyway?

A. Yes, sir.

Q. You heard what Dick said about where he stood there?

A. Yes, sir.

Q. Was that anything else than what was his duty to do at that time, and as these cars were backing?

A. No, sir; it was his duty. There is men stands closer to the rear end than he did.

Q. About that last discharge that Brother Clough calls attention to now. He asks if there was some charge to be made against you or something or another; go on and explain.

A. It was against the rules of the company to carry passengers on a freight train, and we didn't do it as a rule, and I was coming from Bismarck this way and I had a very long train and had

160 way freight; that is, way freight is a little freight for one town and a little freight for another town; and that was on the rear end——

Q. What was?

A. The freight—the way freight—and I always, as a general thing, when I have any work to do—I am on the head end; I ride on the head end, so if there is any orders to get I am prompt; I am off the engine about the time she stops; and there was a man got on at Steele——

Q. How far is that from Bismarck east?

A. That is something over forty-three or four miles this side of Bismarck; he got on the rear car—he got into the caboose——

Q. Which was the rear car, wasn't it?

A. Yes, sir; and I went to Dawson; I had picked up some cars

there; had no way freight to unload there. I still remained on the head end of my train; I rode over to Tappin and stepped off from the head end and pulled up to the hind end and unloaded the freight, and then, instead of going away over to the engine, I got into the caboose——

Q. How far from Steele was — that this man had gotten on?

A. About 20 miles.

Q. Had you known of his being on until that time?

A. I hadn't; no, sir.

Q. What then?

A. I went to him and told him he would have to get off; we wasn't allowed to carry passengers on a freight train. Well, he said he didn't know but what a passenger had just as much right to ride on a freight train as he had on a passenger train. I told him to get off the next station. We got to the next station, Crystal Springs. I had gotten the man out on the back platform; he says to me, "I bought some land at Steele, and I have got to be in Jamestown to fix it up in the morning." He says, "I will give you anything to carry me." I says, "It's against the rules of the company; if I had seen you I wouldn't have let you get on at all." As it was I let the man ride, and he offered me mileage; he took out a thousand-
161 mile ticket. I told him mileage wouldn't be of any use to me; I couldn't turn it in. I said it wouldn't be any money in my pocket to take mileage from you, so I just charged him his mileage, three cents per mile—what his mileage ticket cost—for the distance he rode, and I didn't turn it in; I kept it. I couldn't turn it in. I wasn't allowed to turn it in.

Q. Was there a rule of the company absolutely and imperatively against carrying them?

A. There is; yes, sir.

Q. And you had no right to charge any sum of money to anybody?

A. I hadn't any right to carry anybody.

Q. And if you did carry anybody you had no right to charge?

A. No, sir.

Q. It was an absolute rule you should not carry?

A. Yes, sir.

Q. Have you stated everything there was about that?

A. No, sir. When I saw all the men going I knew what they were going for—I thought what they were going for. I met this old man here. I knew him the minute I saw him. He was a man about fifty years old and wore glasses and was lame. I would have put the man off if he was a young man, but I had compassion on him; that was the whole amount of it, and I abused him; I called him everything; told him what business he was in; told him he had gotten to depriving men of what they ate and drank here. I abused him every way I could.

Q. Is that the thing, as far as you know, that Mr. Clough is referring to?

A. That's it; I have told him about him riding; yes, sir.

Q. You say if he had been a young man you would not have let him ride?

A. No, sir.

Q. He represented he had bought some land and had to be at Jamestown the next morning?

A. Yes, sir. Instead of that he was a spotter.

162 Q. You had got him on the platform when he told you he must be at Jamestown the next morning to fix up the contract?

A. Yes, sir; I felt as if I could have got him there any quicker I would have done so?

Q. You say he was a spotter put there by the company?

A. Yes, sir; used to be paymaster under Mr. Graham; down on the road they came from.

Q. Graham was the new superintendent that came here. You say this new superintendent was bringing his own men here?

A. Yes, sir.

Q. From the noise of the engine, did you know just as well what was done as if you had been looking at it or standing in it?

A. I could tell it was reversed.

Q. Could you tell just as well as if you had been looking at it?

A. Yes, sir.

RICHARD MARES, recalled in his own behalf, testified as follows:

Direct examination by Judge WILSON:

Q. Mr. Mares, was there any one else on the top of that train but yourself at the time you fell or while you were backing down on the track number five that night?

A. There were not.

Q. Did you or did you not fall at the same time of your lamp—had your lamp in your hands when you fell?

A. Yes, sir.

Cross-examination by W. P. CLOUGH;

Q. I understood you yesterday in your examination that McLean was also standing up on the car next the engine?

A. I did not.

Q. Where was McLean?

A. McLean stood on the hind end of the engine on the footboard.

Q. That would be next to the car?

A. Between the car and engine.

163 Q. That would be down low, almost to the ground?

A. Yes, sir.

Redirect examination by Judge WILSON:

Q. On these switch-engines in the yard, Mr. Mares, they have on each end of them a plank on which the men can step?

A. There is a step placed there for the yardmen to step onto and

ride while they are at work, while they are coupling and riding about the yard on the engine.

Q. Is that on both ends of the engine?

A. Yes, sir; it is.

Q. Mr. Clough spoke to the last witness about brakemen sometimes stepping on the front end of the engine?

A. Yes, sir.

Q. Is the board there for that very purpose?

A. Yes, sir.

Q. There is one on the rear end of the engine, too?

A. Yes, sir.

Q. At that time McLean was standing on the rear end of the engine, between the engine and box-cars?

A. Yes, sir.

JOHN MCLEAN, called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by THOMAS WILSON:

Q. Mr. McLean, where do you live?

A. I live in Moorhead.

Q. How long have you lived there?

A. Going on three years.

Q. What is your business?

A. Steamboat man at present.

Q. How long have you been a steamboat man?

164 A. A little over a year now.

Q. In what capacity are you on the steamboat?

A. Firing.

Q. Prior to going on the steamboat what was your business?

A. A railroad man.

Q. Railroad business—where?

A. Well, the last I done was in Fargo.

Q. For what company?

A. The Northern Pacific.

Q. What business?

A. Switching in the yard.

Q. That was the last railroad business you did?

A. Yes, sir.

Q. How long were you switching in the yard?

A. Well, I think about four months, if I remember right.

Q. You were switching in the yard, you say?

A. Yes, sir.

Q. Were you switching in the yard up to the time of the accident to Mares, this plaintiff?

A. I was.

Q. How long had you been switching in the yard before he was hurt; about how long, to the best your recollection?

A. About two months and a half, I think, if I remember right.

Q. Were you in the same gang he was in after he came?

A. Yes, sir.

Q. He was there but a short time before he was hurt, was he?
A. Well, about two weeks, I think.
Q. You were then working at night in the yard?
A. Yes, sir.
Q. As a switchman?
A. Yes, sir.
Q. You say you were in the yard some four months—two
165 and a half months before he came, before he was hurt, about, according to your recollection?
A. About that time, I think; yes, sir.
Q. Were you all the time a night man?
A. Always; yes, sir.
Q. You knew Bassett, then?
A. Yes, sir.
Q. Was he at work in the yard while you were?
A. Yes, sir.
Q. He was every other week a day man?
A. Every other week a day man.
Q. And every other week a night man?
A. Yes, sir.
Q. Whenever his night week was you were with him?
A. Yes, sir.
Q. His day week you were not?
A. I was not.
Q. Had you ever railroaded before that time?
A. Yes, sir.
Q. Where?
A. On the Canada Pacific and Intercolonial.
Q. Canada Pacific and Intercolonial. How long had you railroaded on them and in what capacity?
A. On the Canada Pacific about two years and a half; about six years on the Intercolonial.
Q. What were you doing on them?
A. Well, the first I started to work in the shop, blacksmith's labor; from that wiping locomotives; from that to firing; from firing to running a switch-engine; run her about nine months.
Q. In the yard?
A. Yes, sir.
Q. You meant running as fireman?
166 A. No, sir, as engineer.
Q. And run it about nine months?
A. About nine months.
Q. Yes, go on.
A. When I left that road I came out West here and went on the Canada Pacific.
Q. How long were you on that?
A. About three years.
Q. What did you do on that?
A. Was firing and braking and baggageman.
Q. That is, a baggage-master?
A. Yes, sir.

Q. It's after that you came here?
A. Yes, sir.
Q. And you have told what you did here?
A. Yes, sir.
Q. All that you did here?
A. All that I did here.
Q. While you were in this yard, before the time that Mares was hurt, did you know the rules of the yard and the signals to give and the duties of men in the yard?
A. Yes, sir.
Q. When you wanted, for instance, to back cars, how did you give that signal?
A. Well, I would give an up-and-down signal, as many rises and falls as I wanted the cars backed.
Q. In the night that was given with what?
A. That was given with a lantern.
Q. That is, always?
A. Yes, sir; always at night.
Q. And the number of times you raised it up and down was the number of car-lengths they were to back?
167 A. Yes, sir.
Q. Was it or was it not the duty of the engineer to obey those signals?
A. Yes, sir.
Q. Do you remember when Mares was hurt?
A. I do.
Q. Well, on that night were you at work with Mares and the men?
A. Yes, sir.
Q. Well, do you remember being woke up, as the witnesses before you testified?
A. Well, I don't remember exactly, but I think I was if I remember right. I think we had all been taking a sleep, except Galvin.
Q. Well, do you remember Mares being sent to Bassett to get the switch-engine?
A. I don't remember of him being sent; I know he had been—I had to get out—had left before the rest of the men had and went down in the yard.
Q. How do you know he was sent to Bassett?
A. Well, nothing more than what I heard them say.
Q. Heard who say?
A. Mr. Galvin. We got to talking before we went to work. Mr. Galvin said we had got to go and do our work now and get done as soon as possible——
A. I don't care about your telling, Mr. McLean, what Mr. Galvin said to you; I wanted to know how you knew, if you did know at all, that Mr. Mares was sent to Basset to get him to move the switch-engine?
A. Well, nothing more than I heard them say themselves.
Q. Heard who say?
A. Mr. Galvin.
Q. Did you hear any talk between Mares and Bassett?

A. I heard some sort of a dispute; I wasn't near it enough
168 to know what it was—what it was about.

Q. Did you hear anything said?

A. So as I could understand it?

Q. Yes, sir; anything by either of them—either Bassett or Mares?

A. Well, nothing that I could understand; I was too far away at the time.

Q. You heard some little dispute?

A. I heard some sort of a dispute.

Q. How long was that before Mares was hurt?

A. O, I suppose about fifteen or twenty minutes, if I remember right.

Q. What was done after that?

A. After he was hurt?

Q. No; after you heard this talk?

A. Well, I was going down in the yard; we was kind of scattered around at the time—one here and one there, after we got out, and Mr. Galvin was furtherest down; he was going ahead, throwing the switches the way he wanted them.

Q. Galvin was?

A. Mr. Galvin. I went to one side and was doing something I had to do, and Mr. Mares he went down with the switch-engine; Mares went down on the switch-engine, and Mr. Brant, I think, if I remember right, and Mr. Galvin pulled the pin from the three cars he wanted taken out of number three side track to back in on five. There was a lot of cars on number five side track and we needed to shove them down; at least that is what he wanted. I didn't hardly know at the time what was wanted to be done.

Q. Galvin hadn't told you?

A. He hadn't told me exactly what we had to do, but something had to be done. I knew this had to be done—to shove the cars down in number five, so far as we could get them, to make room for other cars. I stopped somewheres about that number five
169 switch—a little shanty the car repairers had they kept their tools in. Mr. Brant and Mr. Mares went down on the engine——

Q. Down where?

A. To get those three cars. Mr. Galvin was then already down; he pulled the pin.

Q. Galvin pulled the pin?

A. I think it was him, if I remember right, from those three cars. He wanted to keep them next to the switch-engine; pulled them off from number three. Mr. Mares threw the switch for number five and give the signal to back up onto number five.

Q. Onto number five; did you see that signal?

A. I saw the signals myself—seven or eight.

Q. You say that Mares gave the signal to back onto number five?

A. To back onto number five seven or eight cars.

Q. Now, after the switch was turned onto number five and those cars started back, where was Mares?

A. He was on the ground when he turned the switch; then when he gave the signal he jumped up on the cars. I don't recollect whether he got on the first car or middle car or third one, but he got up, and I asked him should I jump on and pull the pin from these three cars. He said, "No, we want to hold these on;" so I stepped on the foot-board of the engine.

Q. When you were backing down onto number five you were on the foot-board of the engine?

A. Of the switch-engine; yes, sir.

Q. That was between the engine and the three cars it was hitched to?

A. Yes, sir.

Q. There are two foot-boards, one in front and one in the rear; you were on which one?

A. On the rear one.

Q. That was between the engine and box-car?

170 A. And the box-car; yes, sir.

Q. Where was Mares?

A. He was then on the cars when we started to back down.

Q. There's where he gave the signals?

A. There's where he gave the signals, if I remember right; just as he was going up on the car he gave the signal from the side of the car. I was on the north side of the car when I got on, so I could see around the curve.

Q. Did you stand all the time, until this accident occurred, on the foot-board?

A. Yes, sir.

Q. Who else was with you now besides Mares and yoursef and Bassett and Galvin—Mr. Brant?

A. Yes; he was there.

Q. Where was he?

A. He was at the hind part of the engine—at the other end.

Q. He was on the front end?

A. Yes, sir.

Q. Then he was on the other side entirely of the engine?

A. At the other end from me, at least.

Q. And he was not in the direction in which the cars were backing at all?

A. No, sir; Mr. Brant wasn't.

Q. Not when you were backing down on number five?

A. No, sir.

Q. Very well, you backed along some distance; go on and tell what occurred.

A. Well, we backed up, I suppose, about—well, as near as I could remember, about two cars and a half or three car-lengths, and the engine was reversed quick, and it kind of shook me where I stood; of course it couldn't knock me down, because it would throw me against the engine or box-car.

171 Q. You were in a place you couldn't fall off?

A. I couldn't fall off very well.

Q. Explain to the jury how that engine was reversed.

A. Well, it was reversed very quickly, with her cylinders full of steam.

Q. Now, explain that please—you know something about that, now.

A. Well, he reversed his engine with her cylinders full of steam; when the steam ain't shut off from the cylinders when you throw the reversing lever over you are reversing her with the steam on; when you reverse her with the steam on you reverse it the other way from what it was going; it won't go at once; it will come to a standstill.

Q. It will turn the wheels the other way?

A. Yes, sir; to a certain extent.

Q. When you make a stop such as is ordinarily made you shut your steam off and then reverse your reversing lever. That wouldn't have this effect?

A. No, sir.

Q. At that time you say he threw the lever right over with the steam on?

A. Yes, sir; I should judge it was by the sound and the sudden stop of the cars.

Q. Now, where you stood there without looking, by the sudden jerk of the cars could you tell?

A. Well, yes; I could.

Q. Could any man accustomed to working with switch-engines tell by the sound and effect?

A. Yes, sir; any one could.

Q. Now, Mr. McLean, state, for instance, when a sudden accident occurs—when you come around a curve and see a person on the track, something like that—something that makes it necessary to take all risks, to make a stop at all hazards—is such a stop as that ever made except when there is some such pressing necessity as that?

172 A. No, sir; in that case it would be necessary to reverse with steam on; to stop as quickly as possible.

Q. Except in some such case as that, is it ever customary or usual to make such a stop as that?

A. No, sir; engineers don't generally do it?

Q. I will ask you whether it is or it — not very risky?

A. Well, it is.

Q. On the car at that time where was it Mares' place to be properly?

A. Well, his proper place to be was on the rear car backing down, so that he could see what was in the way on the track they were backing on.

Q. That was his proper place?

A. That was his proper place or one of us.

Q. And he was the one on top then?

A. He was the one on top at that time.

Q. If he stood on the rear car—on the rear end of the rear car—he was just where his duty called him?

A. Yes, sir.

Q. As these cars were backing down at that time, with that sudden stop that was made, I will ask you whether that was dangerous to any man on the top of the cars?

A. It was.

Q. No matter how skillful he was?

A. No matter how skillful he was.

Q. Had you seen any signal given to stop after the usual signal to back?

A. No, sir; I had not.

Q. You hadn't given any?

A. I hadn't given any. I was watching for signals to give them from him to the engineer.

Q. Was there anybody to give such a signal except yourself or the yardmaster, Galvin or Mares?

173 A. Brant was on the other end of the engine; the other man didn't know what signal to give.

Q. Did you give any?

A. I didn't give any.

Q. Did you see any given?

A. I didn't see any given to stop. I saw no signal given after the signals was given to back.

Q. If a signal had been given to back up, Mr. McLean, and if the engineer had supposed he was going too fast and wanted to cease going so fast, what would his way have been to have properly done it and to have safely done it?

A. Well, to have shut the steam off on his engine and reversed her, after the steam was shut off, so she would stop slowly and gradually.

Q. Is that the usual course in such cases?

A. That's the usual course.

Q. Supposing at that time—the stop he made—you had had six or seven or eight cars on, what effect would that stop have had, in your judgment, supposing you had seven or eight cars on?

A. I think it would have broken the link or pin between the cars.

Q. You think it would have broken the cars apart somewhere?

A. Yes, sir; it would.

Q. It was so sudden?

A. Yes, sir.

Q. I understand you to say that, in your judgment, it would have been likely to have thrown any man off from the top of the car?

A. Yes, sir; any man that was unawares of it.

Q. When that sudden stop occurred that jerked you did you hear anything from anybody else—any alarm?

A. I heard nothing only from the man that got hurt—Mr. Mares.

Q. What did you hear?

A. I heard a cry. I jumped off from the north side of the switch-

engine and ran around to see what the trouble was. I saw it
174 was Mr. Mares got hurt and sitting down on the ground, kind of holding his legs up this way. I think, if I remember right, Galvin and Brant was the first two men there. I think I was the third myself.

Q. Go on and tell what you saw and heard there.

A. I don't remember whether it was Mr. Bassett or Mr. Ryan, the fireman, that was the first of them two that was there or not; but when Mr. Bassett came there Mr. Mares says to him, "Here, you see, if you had 'tended to your business and worked according to my signals." He says, "I did." He says, "You didn't, or this wouldn't have happened." He said, "You are a damned liar."

Q. Who said "You are a damned liar?"

A. Mr. Bassett.

Q. To whom?

A. To Mr. Mares. Mr. Galvin says, "See here, Arthur." He said he had a good mind to tramp him in the ground; something to that effect.

Q. For what?

A. For making use of those words to a man that's hurt. Mr. Mares says, "Never mind, Dan.," he says; I don't remember exactly what was the words—never to mind at present—he wanted to get taken up out of that.

Q. You took him around to the hotel, as the other witnesses have testified?

A. Put him on the front of the switch-engine and run him up opposite the hotel and put him off.

Q. Had you, at the time this engine was reversed thus suddenly, had you gotten nearly back to any cars on number five?

A. Well, I think, about as well as I can remember, about ten or twelve cars; probably a little more.

Q. Well, was there any need of stopping there at all at that time?

A. No; not at all.

Q. Then, of course, no need of him stopping so suddenly with such a jerk?

175 A. No; no need of him stopping at all.

Q. He didn't shut off the steam, but reversed her forward immediately, which gave a jerk?

A. Yes, sir.

Q. Then what did he do?

A. Then reversed her back again, as I would think; I wouldn't be positive; it seemed that way to me.

Q. Could you tell by the feeling and sound?

A. Well, I could tell by the movement of the engine pretty well.

Q. And that run it back over——

A. Over the man, I suppose.

Q. As to Mares, he had been, you say, about two weeks in the yard with you?

A. I think about two weeks.

Q. That was all?

A. Yes, sir.

Q. As far as he was there—as far as you saw and knew—what kind of a man was he—peaceable, quiet, attentive, or the contrary—what was he?

A He seemed to be good dispositioned, quiet, agreeable with everybody.

Q. Was he attentive to his duty?

A. Attentive to his duty; was there nights.

Q. Was he doing anything that night except what his duty required him to do?

A. Nothing but what his duty required him to do.

Q. Was it or was it not skillful and proper for him to be just where he was at the time that occurred?

A. That was his place or any of the rest of us.

Q. In other words, it was his place or one of the crew to be where he was.

A. To be where he was.

176 Q. You stated where you were, to pull the pin between the engine and cars?

A. To pull the pin, if we wanted to leave them down on the side track.

Q. The other man was ahead so that he could turn the switches?

A. Jump off and turn the switches or anything that was required of him.

Q. What kind of a man was this man Bassett? You were there a good long time that fall; what was his conduct—reckless or cautious and prudent?

A. Pretty reckless. Pretty smart.

Q. State what it was.

A. Well, that is what I would say, reckless.

Q. Now, illustrate to the jury how you saw that, what you saw, what you know about it; state to them just what you know about it; what he did or wouldn't do.

A. Well, sometimes, if we would be in a hurry to get the work through quick and wanted it done as soon as possible for our own benefit, to have a rest, provided we wanted to have a rest and had a little work to do and had to do it quick; if he took a notion to do it quick, he would; if not he would do it the contrary; do it slow, make it disagreeable—many times he would go along all right.

Q. Well, say, for instance, if he was ever spoken to about going too slow, then what?

A. He would run the other way, fast again.

Q. Would he run fast enough to be reckless and dangerous?

A. Yes, sir; many times.

Q. Did you, of your own knowledge, see that and know that?

A. Yes, sir.

Q. I will ask you whether you saw and knew these facts of your own knowledge?

A. Yes, sir; I did.

177 Q. You did?

A. Yes, sir.

Q. What was his temper and disposition?

A. Well, he had a quick temper.

Q. Well, when he was angry, how did he act; what did he do?

A. Well, according to the work. If he was anyways cranky, and we wanted things done lively or slow, he would do it just according to suit himself.

Q. What I want to get at is this, Mr. McLean: When he got out of temper or was offended at anything whatever, was he accustomed to be careful and prudent, or was he accustomed to be reckless, so as to endanger those that were at work with him?

A. Well, dangerous, I should say, a great many times. Of course, not at all times.

Q. Oh, say, do you know anything about his ever having been discharged for any reckless conduct?

A. I do; once.

Q. I mean Bassett?

A. Yes, sir?

Q. Well, state about it.

A. I think, if I remember right, the occurrence happened on a Sunday night, at the upper end of the Headquarters Hotel here. There was a stock train coming in from the west, and some passengers on it to go east, and the passenger train was held for those passengers that was on the stock train coming down, and Mr. Fulton gave orders to some one, I forget now exactly who it was, for to have the switch-engine put in the north track and give this stock train the right of way down the main track, then take her caboose off, throw it in the north track, and take the stock up to the stock-yards. The switch-engine was down at the tank, I think it was, getting water; at least, Mr. Bassett and his fireman was, and one of the other men, I think it was a fellow by the name of Adams, work-
178 ing at that time—this was after Mares was hurt—and I slowed them up, I think myself, at the crossing, and jumped on the front end of the switch-engine. The stock train was coming in pretty fast—pretty good speed—just got over the switch, which was at what we call the north and south track, and the engines was so close together he hadn't time to go far enough ahead to give us time to throw the switch, when he reversed the engine and she run off.

Q. How fast did he run up?

A. I suppose 15 or 18 miles an hour.

Q. What do you call your main street—this main thoroughfare—Broadway, I guess it is?

A. Yes, sir.

Q. That is the main thoroughfare across there for foot passengers, and so forth, isn't it?

A. Yes, sir.

Q. Did he run across that at that rate of speed?

A. Just about, I guess; it was some distance below the flag station I slowed him up.

Q. How fast did he run across Broadway where the foot passengers cross?

A. I suppose ten or twelve miles an hour.

Q. You say he backed up so suddenly before the switch could be turned and he run off?
A. Just about half over and he run off.
Q. And he run off?
A. Yes, sir.

Cross-examination by W. P. CLOUGH:

Q. Were you at work for the company at that time?
A. Yes, sir.
Q. When did you say you began to work for it?
A. Well, I don't remember the time exactly, but it was pretty early in the fall, I think.
179 Q. Of '81?
A. Of '81; yes, sir.
Q. Who employed you?
A. Mr. Galvin.
Q. When did you go out of the company's employment?
A. I went out about a month and a half after Dick was hurt; no, not that long; about the last of November or first of December, I think, a year ago.
Q. And this occurrence that you are speaking about now where the engine ran off the track with Bassett happened after Mares was hurt, did it?
A. After Mares was hurt, I think, if I remember right.
Q. As I understand you to say, that running was made by orders from somebody?
A. Well, I don't know. I don't think there was anybody on the engine except Adams——
Q. I asked you if Bassett didn't send his engine up there by orders from somebody to go up and meet the stock train. Did he have orders to go to meet the stock train?
A. He had, but he went and took water before he done it.
Q. Do you know what his orders were to make that run?
A. I don't remember now. I think I heard Mr. Fulton tell some one——
Q. Did you give him his orders?
A. I don't think I did, if I remember right.
Q. Do you know what his orders were?
A. I know what they were. I couldn't say who told me.
Q. How did you know what they were?
A. I heard Mr. Fulton tell it.
Q. To who?
A. That I don't remember.
Q. Did you hear the orders given to Mr. Bassett?
180 A. I heard the orders given to Mr. Bassett, I think, if I remember right.
Q. Did you hear the orders when they were delivered to Mr. Bassett?
A. No, sir.
Q. Do you know in what way they were delivered to Mr. Bassett?

A. No, sir; I know what they were.

Q. Did you know what orders were given to Mr. Bassett?

A. No; I can't say I do.

Q. Now, Mr. Bassett naturally run on the orders given him, didn't he?

A. I suppose he did.

Q. You wouldn't have considered it reckless if he run on orders that were given him, would you?

A. No; I don't suppose I would.

Q. From your knowledge of railroading it was the duty of Mr. Bassett to run on orders given to him, wasn't it?

A. I suppose it would. I know he never was allowed to run that way, though. I think six or eight miles an hour was as fast as they was allowed to run.

Q. How do you know in what form that order was given?

A. I don't know; I didn't say I did.

Q. That is, by a general regulation in the absence of special regulations or orders, six or eight miles an hour was allowed?

A. Yes, sir.

Q. This order given to Mr. Bassett to make that run was a special order, wasn't it?

A. I can't say I heard them; I knew what it meant.

Q. As you don't know that order that was given to Mr. Bassett——

A. I didn't hear it given to him.

Q. Do you pretend to say he didn't run exactly as he was
181 ordered to make that run?

A. I couldn't say as to that, of course.

Q. Outside of that one occasion, when you didn't hear the order given and don't know what it was, I would like to have you state some cases happening before the time that Mr. Mares was hurt in which you claim any reckless conduct or management of engines or cars was perpetrated by Bassett; I would like to have you give some one instance; I would like to have you give us some instance of recklessness—tell us what he did, in your own observation. I want to know what you ever saw him do with his engine or with cars or handling cars that was reckless or dangerous to life or limb of anybody?

A. I have seen a good deal of it.

Q. Well, I would like to have you tell us one instance.

A. Such as breaking draw-heads and bruising up coaches and baggage-cars and men going in to couple, and such things as that.

Q. Won't you please give us one instance? I only ask you for one now.

A. I don't know as I can remember any particular one.

Q. Can you give any one instance prior to the time in which Mares was hurt in which you obeerved any recklessness or dangerous handling of cars by Mr. Bassett with his engine?

A. I don't suppose I can give any particular one. I know he was pretty reckless all that night—pretty lively.

Q. Just tell us what he did in the earlier part of the night.

A. Well, if he got a signal to back up a car slowly he would do it the other way.

Q. What is the signal to back up slowly?

A. You give a signal — one car and according as you are approaching the other car drop your lantern slowly.

Q. Do you pretend to say that night whenever any signal was given for him to back slowly he backed rapidly?

A. Yes, sir.

182 Q. Whereabouts in the yard?

A. Well, different places.

Q. Did he do it more than once?

A. More than once? Yes, sir.

Q. You were with him all that night?

A. All the time he was working.

Q. Did anybody in charge of the work—did Mr. Galvin—caution him or correct him in regard to that?

A. Well, Mr. Galvin always did.

Q. Did he that night?

A. I don't know whether he did that night or not. I know we had been working pretty lively the fore part of the night.

Q. Had you been at work all the week in that gang?

A. I wouldn't say I was. I can't remember.

Q. You don't remember with whom you did work?

A. I know who I always worked with. I don't remember whether I was working every night that week.

Q. Suppose you were at work every night that week, who would be in your crew?

A. Mr. Galvin, Mr. Brant, and Mr. Mares.

Q. Did you work with any other engineer, if you worked each night that week, except Bassett—Arthur Bassett?

A. Well, sometimes they changed around; sometimes would have another, but he was generally our man at night—Mr. Bassett was.

Q. You say previous to the time when Mares was hurt—in the evening Mares was hurt—in the morning previous, that same evening he had disobeyed orders—run more rapidly than it was his duty to run?

A. Yes, sir; many times.

Q. What was the effect of that?

A. Well, sometimes he would break the draw-head——

Q. Were any draw-heads broken that night?

A. I can't remember. I don't know as there was. I don't

183 think there was any particularly broken that night.

Q. Was it a matter of conversation between Mr. Mares and yourself, or Mr. Galvin and yourself, that he was disobeying orders that evening?

A. It was between our own selves—the outside crew. I had said nothing to him that night. In fact I don't think I ever did check him for running too fast; Mr. Galvin done that himself.

Q. I am speaking about this evening on which this occurrence

took place. You say you talked that among yourselves, he was running carelessly that evening?

A. I don't remember correctly. I don't know whether we did or not that night. I think we did. I think we was saying something; he was mad anyhow—missing couplings anyhow.

Q. What do you mean by that?

A. Coming back too fast. The man wouldn't step in between the cars to make the couplings.

Q. That frequently happens, does it, in the yard?

A. Well, it does; certainly.

Q. Will you say Mr. Bassett in the handling of his cars was any more rapid or sudden in his movements than yardmen are generally?

A. He was a good deal more so than some engineers that was in that yard.

Q. I am talking about average engineers in a yard generally; did he handle the cars any more rapidly than engineers generally in the yard?

A. Yes, sir; he did.

Q. Did he handle them very rapidly?

A. Yes, sir, sometimes; and then again about as slow as anybody.

Q. In handling cars in the yard isn't there a constant pulling and jamming and bumping of the cars?

A. Yes, sir.

Q. That happens always?

184 A. Yes, sir; there will be a little bumping and slacking motion, no matter how slow you handle them.

Q. At that particular time the yard was full of cars, wasn't it?

A. Well, I can't say as it was extra full.

Q. There were a great many cars in the yard?

A. Yes, sir; that was the reason we was going on number five, to shove the cars down to get room for others.

Q. You were in a hurry at that particular time?

A. I think we were in considerable of a hurry.

Q. Do you remember what was the particular occasion for being rapid that morning?

A. I think we had train number eleven, if I remember right, to make up; I think we had only three cars of it; those were the three cars we took first out of number three. There was a lot of cars—some number, some train—I can't remember the number of her—that was coming in; this train had to be switched when it came in. Those three cars we took out of number three and went down on number five with we kept them on the switch-engine.

Q. The time you had to work was so short you had to work fast?

A. We had time enough.

Q. Didn't you so understand from Mr. Galvin he was in a hurry?

A. Yes, sir.

Q. When Mr. Galvin sent Mr. Mares up to get the switch-engine didn't he tell him to hurry up?

A. I think he said hurry up—something to that effect—on account of the train that was coming.

Q. The train wasn't yet here?

A. I don't think it was yet in. After Dick was hurt, what happened in the yard after that I don't know. From the time we took Mares to the Headquarters Hotel, I stayed with him until eleven o'clock the next day.

Q. Can you tell me how long it was after Mares was hurt
185 before that train arrived that was expected?

A. I can't say.

Q. Was it three minutes, or five minutes, or ten minutes?

A. I don't remember of the train coming in at all. Mr. Galvin and Mr. Brant done the work themselves after that.

Q. You didn't see the train arrive?

A. No, sir; I don't know whether it is in yet, for my part.

Q. You say you took the position of the man next to the engine to repeat the signals given by the hind brakeman?

A. Yes, sir; when they would be given.

Q. I understood you to say that it was the duty of one brakeman in handling the cars to be on top of the cars?

A. Yes, sir.

Q. Was it his duty to stand up without taking hold of anything to support himself?

A. He could do as he pleased about that.

Q. Was there anything about his duty that made him stand; couldn't he have as well sat down and hung onto the irons?

A. I suppose he could.

Q. Couldn't he also have taken hold of the brake-rod to support himself?

A. Yes, sir; he could have done that, too.

Q. There was nothing to prevent him, was there?

A. Not that I know of.

Q. Was there any particular duty that required him to stand up without supporting himself on the top of the car?

A. Well, I don't know about that.

Q. There was a brake on the car, wasn't there?

A. I can't swear whether there was or not; lots of them don't have —.

Q. As a general rule, there is brakes on a car, isn't there?

A. Yes, sir; there is.

186 Q. Also irons on the roof?

A. Yes, sir; a kind of a hand hold.

Q. A part of the ladder—an extension of the ladder up over the top of the car?

A. Yes, sir.

Q. Was there anything in the performance of his duty that wouldn't have permitted him to sit down near the end of the car and hold onto these irons to support himself?

A. There was nothing to prevent him, I suppose.

Q. Isn't that very frequently done in switching?

A. Why, yes; a man, you may say, he is in all shapes, all over the cars, in switching.

Q. He can, in a case of that kind, sit down on the roof of the car and hang on with his hand?

A. He can if he wants to.

Q. So, if an engine is being run through the yard, a man, if he wants to, can stand in front of it and jump on the foot-board?

A. Yes, sir.

Q. He isn't obliged to do it?

A. No, sir.

Q. The common way is to stand to one side and catch it?

A. Yes, sir; to stand to one side.

Q. Isn't it a fact that yardmen and brakemen in the yard are constantly exposing themselves to perils in the doing of their business?

A. Well, yes; some of them.

Q. Some are a great deal more reckless and careless than others?

A. Yes, sir; the better the man is the more careless he is generally.

Q. Men that take the most chances are the men that do the most work?

A. Yes, sir.

Q. Well, a man can get along without taking so many chances if he sees fit, can't he?

187 A. Yes, sir; he can.

Q. You say you stood on the north side of the three cars when they passed the switch?

A. I was standing on the north side of the foot-board—on the north side of number five as it was backing down.

Q. Did you throw the switch to let the cars onto number five?

A. No, sir.

Q. Mr. Mares did that?

A. Mr. Mares, I believe, was the man that done it.

Q. On which side was the switch-bar?

A. It was at that time on the north side.

Q. So that Mr. Mares, when he threw that bar, was on the same side you were standing?

A. He was on the same side I was standing; Mr. Galvin he was on the opposite side.

Q. Let me ask you in the first place, were the three cars and engine approaching the switch when it was thrown, or were they standing still?

A. I don't remember. We run by the switch quite a piece before it stopped.

Q. That is run by the switch on three?

A. On three; yes, sir.

Q. Now, when the switch onto five was turned by Mr. Mares, was the train running backward or had it stopped?

A. I don't remember whether it had stopped or not; I think she was pulling up slowly, backing the three cars down.

Q. After that switch had been turned was any signal given to the engineer to reverse her position and go towards the switch?

A. I saw none; Mr. Mares, when he got ready to jump on the cars, gave the signal to back up seven or eight cars.

Q. The engineer after he had pulled past the switch reversed his motion and backed onto five?

188 A. He was on five. He gave him the signal after he had gone over three.

Q. Who gave him the signal to come on five?

A. I couldn't say whether it was Galvin or Mr. Mares.

Q. Did you see any signal?

A. I didn't, for I was on the opposite side from him at the time.

Q. You don't know whether any signal was given to him to reverse the engine, then, and go towards the switch that led into five?

A. Well, I don't know. I suppose he did or he wouldn't have went.

Q. But when the cars came along then you say the signal was given?

A. The last signal I saw was to back up seven or eight cars.

Q. Now, where was that signal given?

A. He stood right by the switch.

Q. The switch on number five?

A. One switch answered for three tracks, I think.

Q. A three-throw switch?

A. Yes, sir; when he got the switch all right to back on number five he gave the signal to back up; whether the engine was backing up slowly or standing still I could not say; I don't remember.

Q. When he gave the signal to back up, he then got on top of the car?

A. Which car he got onto, the hind car or one next to the engine, or second or third one, I can't say, but when he gave the signal he got on top of the car.

Q. He stood on the ground, did he, when he gave the signal?

A. He was about half way up the car, if I remember right.

Q. He wasn't on top of the car when he gave the signal?

A. I think not, if I remember right.

Q. He was giving the signal and climbing at the same time?

A. Yes, sir. Says I, "Dick, will I pull the pin when you

189 are ready?" Says he, "Don't pull the pin, we want to bring these three back again; want to shove the cars down on five to make all the room we can."

Q. When he told you that where was he?

A. Not far away.

Q. Was he standing on the car he climbed up?

A. He was on the car he climbed up.

Q. If he was on the third car on the end of the car and you were standing on the foot-board, about what distance would he have been from you when he called out to you in that way?

A. He would have been two cars away from me, because I was at the end of one car standing on the foot-board when I asked him. I thought he was going to leave them all in. I didn't know what he was going to do at the time.

Q. He must have been sixty or seventy feet away from you?

A. I don't know whether he was.

Q. Could you see him when he was on top of the car?

A. I could see him on the car.

Q. If you had been standing on the foot-board at the end of that car, would you have been up close to the end of the car next to the engine?

A. I would have been close to the car.

Q. How high are those cars?

A. I suppose they are 12 or 13 feet high from the track.

Q. How high is the foot-board upon which you stood?

A. I suppose about 18 inches from the track.

Q. How high are you?

A. About five feet six.

Q. So the top of your head or the line of your eyes would be six or seven feet above the ground and the top of the car would have extended about six feet above your head?

A. Somewhere in that neighborhood.

Q. How could you see him with six or seven feet of the car extending above your head?

190 A. I wasn't standing in the middle of the car; I was standing on the end of the foot-board; could see him part of the time; could see the light.

Q. You could see the top of a man on top of the car, could you?

A. Yes, sir; I could see all of the man.

Q. I understand you were standing there to see any signals that might be given and repeat them to the engineer. When he was on top of the car the engineer couldn't see him, could he?

A. Yes, sir; could see signals three cars away.

Q. Why was it necessary for you to stand there to take his signals?

A. Probably he might not see his signals and I would, and I would give them to him.

Q. Isn't it a fact in running an engine of that kind the engineer has to pay some attention to his machinery—cannot be looking out all the time?

A. Not all the time; yes, sir.

Q. Particularly, in running the engine backward, he would have to look to the machinery—to tend to the engine; that's the way he has got to look. Where he would have to get the signals and where he would have to look at the levers would be another way?

A. Yes, sir.

Q. Wouldn't he have to look in front to the levers and machinery that needed his attention?

A. There isn't much that needs attention.

Q. It is necessary to look at them occasionally?

A. Yes, sir; occasionally. His water is the most important part.

Q. He has got to look at the water almost constantly?

A. Well, yes.

Q. So that in the process of backing he could not keep his eye all the time back to watch for signals?

A. Well, he has a fireman.

Q. And he had you down below?

191 A. He had me down below.

Q. It was considered necessary that all this assistance should be given in order that signals might not be lost?

A. Yes, sir; I was looking for Mares' signal.

Q. Was Mares, when he was on top of the car and you was standing on the foot-board, in sight all the time?

A. No.

Q. He wasn't in your sight all the time?

A. He was not in my sight at the time he fell off or was knocked off.

Q. When he had taken his position on the rear of the past car, in the middle of it, you couldn't see him any more?

A. I saw him on the end of the car—the car he fell off from.

Q. He was in plain sight, then, was he?

A. He was in plain sight.

Q. As soon as he stood up at the end of the car from which he fell he was in plain sight?

A. He was in plain sight as long as I wanted to watch him sharp. I could see him any time. When he would give me a signal I could see his lantern, when I probably wouldn't see him.

Q. You could see the lantern without looking at him, could you?

A. I didn't want to look at him; it was the signals I wanted.

Q. Was your face turned towards him or towards the engine?

A. Towards him, back towards the engine.

Q. You saw him standing up on top?

A. I saw him standing on top of the cars.

Q. But didn't see him when he fell?

A. No, sir.

Q. You say when you were standing in that position, and the cars were moving back, you think they had moved back two or three carlenghts when the engine was reversed?

A. As nearly as I could judge; probably a little less or a little more.

192 Q. What you say was done in there in regard to reversing the engine you know by sound and feeling?

A. Yes, sir; I didn't see him do it, of course.

Q. For all you know, could you state that the steam was not then shut — when he reversed that engine?

A. I could tell pretty near.

Q. Isn't it a fact that after the steam has been shut off the cylinders remain full of that steam that is in there?

A. Yes, sir; it does, providing she don't make any revolutions.

Q. Isn't it true that whenever the throttle-valve is closed it leaves all the steam that's outside the steam pipe and cylinders full?

A. Yes, sir.

Q. You answer yes, that when the throttle-valve is closed then the steam-pipe remains full of steam?

A. Yes, sir.

Q. And the steam chests and cylinders?

A. Yes, sir.

Q. Suppose the wheels of the locomotive do not revolve any when the steam is shut off sudden?

A. Of course the steam pipes and cylinders and chests are full of steam; she makes one revolution and it escapes.

Q. After that steam is in there, after it is shut off, it is still at a higher pressure than it is on the outside in there?

A. Well, I ain't prepared to say.

Q. Doesn't it have to exhaust—after the steam is shut off, doesn't it have to exhaust?

A. Yes, sir.

Q. How many exhausts would there have to be before those steam-chests can be emptied?

A. Four.

Q. There would have to be four exhausts, wouldn't there?

A. Yes, sir, to empty the cylinders and steam-chests.

193 Q. So, notwithstanding the steam had been shut off, there would be four exhausts before the steam would all be out?

A. Yes, sir; well, one would take it pretty near all out.

Q. Now, suppose the steam were closed off, there would then be four exhausts, and the valves were reversed so as to reverse the engine, wouldn't there still be a few exhausts, notwithstanding the steam was shut off?

A. Yes, sir; according as it was wasting and escaping away a very little.

Q. But there still would be an exhaust?

A. Yes, a very slight one.

Q. Are you willing to swear that the steam at the time that the reversal of this engine took place hadn't been shut off?

A. Well, I couldn't swear that it was or was not. I know it was very strong; it was quite a shock.

Q. Now, was not the exhaust of that engine very strong and peculiar?

A. Yes, sir.

Q. Different from other engines?

A. Oh, no; not different from other engines.

Q. Wasn't it a remarkably loud and strong exhaust?

A. Well, yes; any switch-engine generally is.

Q. Hadn't this a particularly loud and strong exhaust?

A. I don't know as it had.

Q. Now, might this not be true, that before that engine was reversed the steam was shut off and the engine was not reversed—the lever was not pulled back until after the steam was shut off?

A. Well, it might and it might not.

Q. You will not pretend to say that it was not, will you?

A. Well, no; I couldn't swear that it was not, but to the best of my knowledge I don't think it was.

Q. Of course you only give it as a matter of opinion?

A. Only an idea.

194 Q. You might be mistaken?

A. I might be mistaken, of course; I wasn't in the engine.

Q. Now, you say that the cars checked up quite suddenly?

A. Quite suddenly; yes, sir.

Q. Now, suppose Mr. Mares had been either sitting on the front

end of the car and holding onto the irons, as he might, or had took hold of the brake-stem or wheel, couldn't he have easily maintained his footing?

A. Well, I don't know as he could if he wasn't aware of it.

Q. Was that shock that you felt there any harder than you feel every time in switching?

A. Yes, sir; a great deal harder——

Q. It was a good deal harder?

A. Yes, sir.

Q. Than you feel every time in switching?

A. Yes, sir.

Q. How much harder?

A. Considerably harder.

Q. Isn't a shock always given at the stopping and starting of switching?

A. Of course there is; it depends altogether on the way you do your work; if you start up quicker it is louder and stronger.

Q. Suppose you were in a hurry to do the switching before another train would come in, wouldn't there always be a strong shock in starting and stopping the cars?

A. If you start quick and stop sudden there would.

Q. If you were in a hurry to do your work that's what you would do, isn't it?

A. Yes, sir.

Q. If you were in a hurry to do your work you would stop the switch-engine promptly and rapidly?

A. Yes, sir; promptly—not too rapidly.

Q. That would make a shock in starting and stopping?

195 A. Yes, sir.

Q. When the engineer reversed this engine did it stop entirely?

A. If I remember correctly I don't think it stopped backing at all.

Q. It just kept right on backing?

A. Yes, sir; of course, slowly; there was only three cars; it was done so quick you could hardly tell whether she stopped or kept on; I think she kept on slowly.

Q. When that stop was made state about how fast she was going.

A. Oh, she wasn't going very fast, I don't think.

Q. About how many miles an hour was she going when the lever was reversed?

A. She wasn't going more than four or five miles an hour; that's pretty slow, I think, if I remember right.

Q. That's about what a good man can walk?

A. Yes, sir; a good man.

Q. Is it not beyond the power of a man to walk it—it he steps rapidly he can?

A. Oh, yes.

Q. Brakemen walking around the yard walk faster than that?

A. Yes, sir.

Q. Have to do it to make the couplings, and so forth?

A. Yes, sir.

Q. Was there anything to prevent Mr. Mares from going along on the ground to make that coupling?

A. He could have walked if he chose; we wasn't going so fast but what he could have walked.

Q. Isn't that commonly done—a brakeman to pull the pin and walk off in front?

A. Yes, sir.

Q. See it frequently?

A. Yes, sir.

Q. It is often easier to ride, but there was nothing to pre-
196 vent him from walking; it was probably easier for Mr. Mares to get up and ride this time than to walk?

A. Yes, sir.

Q. He could have kept up with it if he had seen fit to walk?

A. Yes, sir.

Q. They do it both ways, don't they; when they get tired one way they do the other?

A. Yes, sir; it's a kind of rest.

Q. When did you first perceive Mr. Mares was off this car?

A. When I heard him holler.

Q. Where did he appear to be when you heard him holler?

A. I think he laid opposite the fire-box, if I remember right. The engine was somewhat abreast of him.

Q. Did you see his lantern fall?

A. I did not; it fell on the opposite side from me—fell on the side Mr. Galvin was on—towards the south, if I remember right.

Q. Then, as a matter of fact, you didn't see Mr. Mares until you passed him?

A. I didn't pass him.

Q. I know you were on the opposite side, but until the foot-board had passed him?

A. I hadn't seen him then; I jumped off the foot-board and run around the engine.

Q. Did you hear him cry out until after the foot-board on which you were standing—the foot-board—had passed him?

A. I heard it when I was on the foot-board; I suppose at the time he fell or was hurt.

Q. Did you know what it was?

A. I did not know what it was.

Q. Did you hear any call or cry in the cab from the fireman or engineer?

A. I think I heard the fireman say there was somebody hurt.

197 Q. Was the engine stopped then—upon that call being made was the engine stopped then?

A. I don't remember whether it was or not.

Q. She must have been, mdsn't she?

A. She wasn't stopped at the time he was hurt—at the time he fell off—because there was three cars passed him.

Q. I mean after you heard the cry. Wasn't the engine checked up then, instantly brought to a dead stand?

A. That I can't remember; I don't remember that.

Q. That might have been true?

A. It might and it might not.

Q. Do you remember whether the engine was reversed at that time when that stop was made?

A. I wasn't in the cab, sir; I couldn't tell.

Q. Couldn't you tell from the feeling?

A. I couldn't feel her.

Q. Wasn't she reversed with the steam on that time?

A. Well, this was after she was stopped; I don't know what happened.

Q. You staid on her till she was stopped?

A. I jumped off while she was still in motion. Whether she was stopped when I went around where Dick was I couldn't tell, because I was in a hurry when I heard the cry.

Q. You heard the cry and jumped off before the engine was stopped?

A. I think I was off.

Q. You don't know whether you were or not?

A. I would not swear.

Q. You don't remember how she stopped?

A. No, sir.

Q. Don't remember whether she was reversed or not?

A. That I don't know; I don't remember.

Q. Don't remember whether the steam was on when she
198 was reversed or not?

A. She only went a little piece after he was hurt. I will just tell you now, when he was backing down, when we got the signal to back up, I think, if I remember right, about two or three cars from the switch, probably more—I ain't prepared to say—and then when he was backing down, when Dick was climbing onto the car for to walk back like——

Q. Which car was that?

A. I can't remember whether it was the third or second or first car; ain't prepared to say; then he was going to walk back, you see, to his place, and the engine reversed like we was backing down; reversed forward, as I explained to you; reversed forward and then back again, I thought, quick; that's the way I thought it was, of course; she was stopped, but whether she was stopped with the steam on then I can't say.

Q. Are you certain you were off before she stopped at that time?

A. I can't be certain.

Q. You may have been on it?

A. I might have been on the foot-board, of course; I don't remember now; it's not so very long, but I don't remember rightly. I know the moment I heard the cry I jumped off from the foot-board and ran around. I heard somebody saying somebody was hurt; when I got there Mr. Galvin was there and Mr. Brant.

Q. Mr. Bassett got off the engine, too, didn't he?

A. Yes, sir; so did the fireman.

Q. What was done with Mr. Mares after he had been hurt in this way?

A. Well, we picked him up off from the track, placed him on the front of the switch-engine, run her up to the Headquarters Hotel, took him off the front of the engine, put him on a truck what they used for handling baggage and one thing and another there, and then we wanted to get him in the hotel; then, I think it was, the night clerk refused to give us a room. I think Mr. Galvin
199 woke Mr. Fulton up, and I think when Mr. Fulton got up he got a room for him; I won't be certain whether it was Mr. Fulton or one of the boys.

Q. I simply want to know whether Mr. Bassett wasn't with him after he was picked up, more or less, that morning before he was taken into the hotel; Mr. Bassett didn't go off and leave him, did he?

A. Well, we was all there for a few moments, I think, the whole crowd of us.

Q. The fireman stayed and took care of the engine, didn't he?

A. I don't know; I ain't prepared to say.

Q. Now, did you hear anything that was said on that occasion; did you hear Mr. Mares say anything about the reversal of the engine or the sudden stopping or checking of the rate of speed, or anything of that kind?

A. I didn't have any talk with — until after his legs was taken off.

Q. I mean on that occasion there, before he was taken into the house.

A. Well, I can't remember.

Q. He didn't make any complaint, did he, when he was talking to Mr. Bassett? That's what I want to get at. When he was talking to Mr. Bassett did he make any complaint at all about Mr. Bassett having checked the speed?

A. Not that I heard; he didn't complain; the only complaint he had was for not obeying signals.

Q. But didn't say anything about checking the speed?

A. Not in my hearing; not that I know of.

Q. Are brakes used in shifting cars in the yards for the purpose of checking the cars?

A. Well, in some cases they are; not a great deal.

Q. That's generally done by the engine, isn't it?

A. Well, sometimes it is.

Q. I mean the cars are checked by the engineer or engine in handling them.

200 A. They are checked according to the yardmaster's judgment; they are taken and distributed where he thinks he will want them together.

Q. Supposing the cars are on the go, is it the engineer that checks them or the brakeman by setting the brakes?

A. The engineer.

Q. He does it how?

A. By reversing his engine—that is, the cars that are still coupled onto the engine.

Q. It is a common thing, then, in yards and a common manner to

check the speed of cars in that way that are attached to the engine by reversing the engine?

A. Well, generally done in the yard.

Q. Done by the reversing of the engine?

A. Yes, sir.

Q. What you think was wrong in the handling of these cars was that the engine was reversed with the steam on; is that it?

A. Yes, sir.

Q. When a signal has been given an engineer to back, as in this case, is he obliged to back at any particular rate of speed, or is he to exercise his own judgment as to what speed ought to be used?

A. When a man gives him a signal to back up four or five or six cars, as it may be, his own judgment will tell him pretty near how far to go and how fast to go.

Q. The man who gives the signals don't dictate the rate of speed he shall go, only the distance?

A. Only the distance—well, in some cases. Supposing he was making couplings on a side track and maybe the car is all alone—a man couldn't go too slow to make that coupling. A man has got to act generally on signs to make those couplings.

Q. Then, when the signal was given to Mr. Bassett to back seven or eight cars, it wasn't a signal to back at any particular rate
201 of speed, was it?

A. No, sir.

Q. That left Mr. Bassett, by his own judgment, to determine what was a safe speed for backing?

A. Well, I suppose it did; yes, sir.

Redirect examination by THOMAS WILSON:

Q. You say, Mr. Witness, it left Mr. Bassett as judge what speed to back. Do you think any prudent man, or any man that was not reckless of the lives of those that were about that train, would have stopped that train with the rapidity that he stopped it that time?

A. Well, he didn't have any right to stop.

Q. Well, do you think that any engineer that wasn't reckless of the lives and limbs of those that were about that train would have stopped it with that suddenness which he did there?

A. No, sir; I don't think it.

Q. Well, he can back slowly; that is within reason, isn't it?

A. Yes, sir; he can go slow or fast if he likes.

Q. But isn't there an understanding in the yard as to what is safe and reckless?

A. Yes, sir; well, not an understanding; they generally know themselves what is fast enough and what is slow. Of course a man knows when he goes to work; he likes to work pretty fast sometimes.

Q. But in the night is it or is it not the rule, or is it or is it not the duty, of the engineer to back or stop as he gets a signal to back or stop?

A. Yes, sir; it is.

Q. It is his duty to do so?

A. It is his duty to do so.

Q. Now, in a case like this, Mr. McLean, the counsel has asked you whether he couldn't have sat down on the top of that car—whether Mares couldn't—and taken hold of the iron and held on; let me ask you if it's at all necessary to do that if the cars
202 were handled or in the ordinary manner?

A. No; it ain't necessary.

Q. Is it customary to do any such thing?

A. Well, sometimes men do, sometimes they don't.

Q. Well, is it customary; what is the rule, what is the usage, when you are backing down the track a short distance this way—when in the night you are looking out to see what is on the track what is the custom?

A. Well, generally stand up; I know I always done it.

Q. You say they generally do?

A. Yes, sir; you can see all around better.

Q. Is it or is it not perfectly safe to do so if the cars are carefully and prudently handled?

A. Yes, sir.

Q. Perfectly?

A. Yes, sir; perfectly safe.

Q. The way these cars were stopped at this time, supposing this man had been sitting down taking hold of this little rod that's on top of the cars, wouldn't that sudden jerk have thrown him off at that time?

A. If he was sitting too near the side of the car it would; yes, sir.

Q. Could he sit down without sitting near the side of the car?

A. He would have to sit in the middle of the car.

Q. Mr. Clough asked you about this upper round of the ladder that's there; he asked you if he could not have sit down on the side of the car and hold onto that little round of iron.

A. I don't think he could; I wouldn't want to be there and do it.

Q. Did you ever know any man that was accustomed to be a brakeman to sit down and hold onto the round of such a ladder for safety?

A. Well, not for safety; I have done it myself many times.

Q. Well, why?

A. Well, supposing I wanted to go a short distance on the car, or was going down probably as the car was backing down the same, make a couple of steps and hold on.

203 Q. Mr. Clough had reference to going on top and sitting on the top of the car, sitting down and holding onto the round—that is, sitting down on the edge of the car on top and doing that; supposing he had done that, wouldn't such a jerk as this in all probability have thrown him off from there?

A. I think it would; yes, sir.

Q. Then he wouldn't have been any safer there than he would standing up where he was?

A. No, sir.

Q. I ask you the question if Mr. Mares wasn't—if he was doing

just what he said he did; if he wasn't doing what was customary and usual and safe for brakemen to do in case cars are properly handled?

A. Yes, sir; he was.

Q. In the night when he was standing there he had to have one hand holding onto the lamp, didn't he?

A. Yes, sir.

Q. Couldn't he see around and in front of him better where he was than he could sitting down where you speak of?

A. Well, he could see further over the yard.

Q. Well, and down the track for cars?

A. Yes, sir.

Q. Counsel asks you if Mr. Bassett hadn't got an order to run up this time you saw him. You swore he ran up over Broadway and then ran off the switch; before you had got the switch half turned he backed off. Counsel asked you if he hadn't got orders to do that; let me ask you further if he wasn't discharged for it?

A. Yes, sir.

Q. Very well; is a brakeman very often discharged for doing that that he has orders for doing, or an engineer?

A. Yes, sir; sometimes they are.

Q. Well, you say he was discharged for doing that?

A. Yes, sir.

204 Q. The counsel spoke of stopping on the foot-board in front of an engine; isn't that foot-board put there on purpose for brakemen to stand on?

A. I can't swear it is.

Q. Isn't that what it is used for?

A. That's what it is used for.

Q. In your best judgment, isn't that what it is there for?

A. That is what it is there for.

Q. Do not brakemen use it in the yard for that purpose?

A. Yes, sir.

Q. Did you ever hear any objection made to it by railroad or yard men?

A. I never did; no, sir.

Q. On that train where there were only three cars it was not necessary to repeat any signals; the engineer could see Mares where he was; where there were only three cars in length of the train and where Mares stood on the hind of three cars, could the engineer in his engine have seen the signal of Mares?

A. Oh, he could see him; yes, sir.

Q. There was no need to repeat them?

A. No; no need to repeat them, I don't think; no.

Q. When an engineer is backing this way—backing onto a track—is it not only his custom but duty to look back?

A. Always to look the way he is going.

Q. The counsel talks about the necessity of looking at his engine; say he was going to back eight or nine cars here, is there any need to look at his engine in going that distance?

A. Not unless there is something wrong.

Q. Unless there is something happens he don't need to look forward?

A. No, sir.

Q. It is always his duty to look as he is running, you say?

205 A. Always look the way he is going.

Q. Do you remember whether these cars were loaded or empty—these three cars?

A. I think they were loaded; for the west, I think, if I remember right.

Recross-examination by W. P. CLOUGH:

Q. Was there any time after this engine and these cars passed the switch to go onto track number five until it finally stopped that it didn't keep on moving east?

A. After it was reversed, you say?

Q. Yes; she kept right on moving east, didn't she, at the time Dick got hurt?

A. Yes, sir; I think she kept on moving slowly, very slowly.

Q. Until she finally was stopped?

A. Well, she was stopped.

Q. She was reversed and then reversed again, and then there was a cry, and then she was stopped suddenly, like being reversed quick?

A. After the cry I think she was still moved a little east.

Q. When the cry came she was stopped very suddenly, wasn't she?

A. Yes; pretty suddenly, but she still moved a little—still slowed down, you know.

DANIEL F. GALVIN, recalled for plaintiff, testifies as follows:

Q. Were these three cars loaded or unloaded?

A. They were loaded.

Q. What with?

A. Lumber.

Plaintiff rests.

206 *Defense.*

Thereupon the defendant, by its counsel, at the close of plaintiff's testimony, moved the court to dismiss said action upon the ground that plaintiff had failed to adduce evidence to sustain his cause of action:

1. That he had failed to establish that he was hurt through the negligence of Bassett.

2. That he had failed to show any want of ordinary care on the part of the railroad company, the defendant, in the selection of Bassett, as its employé, for running that switch-engine.

3. That it had been clearly made to appear that he, Mares, was negligent on his part in a number of different ways; that he has been guilty of negligence on his part, which contributed and tended directly to his hurt.

Which motion was then and there overruled by the court, and to which ruling the defendant, by its counsel, did then and there duly except.

Thereupon the defendant, to maintain the issue on its part under the pleadings, introduced the following testimony:

ARTHUR D. BASSETT, called as a witness in behalf of the defendant, being first duly sworn, testifies as follows:

Direct examination by W. P. CLOUGH:

Q. Where do you live, Mr. Bassett?
A. Here in Fargo.
Q. How long have you lived here?
A. I have lived here since the spring of '76, except one year, which time I spent in Bismarck.
Q. Since the spring of 1876, except one year spent in Bismarck?
A. Yes, sir.
Q. When did you first go to work at the business of railroading?
207 A. In May of 1876.
Q. Where did you go to work and for whom?
A. In May, '76, I went to work for Mr. Rossiter in the engine-house at Fargo.
Q. Who was he?
A. He was the division foreman at that time.
Q. For what company?
A. The Northern Pacific Railroad Company.
Q. He was division foreman in the shops, you mean?
A. Yes, sir.
Q. Of the Northern Pacific Railroad Company at Fargo?
A. Yes, sir.
Q. What did you go to work at when you first went in the shops?
A. At bolt cutting and running the drill-press.
Q. How long did you work in the shops?
A. About three months, I think.
Q. That was in the year 1876?
A. Yes, sir.
Q. Was that for the purpose of fitting yourself to be an engineer you went into the shops?
A. Well, getting myself familiar with the machinery.
Q. How long did you say you worked in the shops altogether?
A. About three months.
Q. In what departments in the shops?
A. As before stated, running drill-press and bolt-cutter.
Q. After you had finished that work or apprenticeship what did you do next?
A. Fired in a yard engine.
Q. How many engines were there in this yard at that time?
A. One.
Q. Under what engineers did you work as fireman?

A. Mike McDonough at that time.

208 Q. How long did you work with him?

A. About 18 months.

Q. That would bring you up until the summer of 1877 or fore part of 1878?

A. Yes, sir; worked in the yard about eighteen months with him; then put in a year or two on the road with him; spent eighteen months in the yard with him, and about a year on the road.

Q. Worked with him about eighteen months in the yard here and then went out on the road?

A. Yes, sir.

Q. You run on the road with him?

A. Yes, sir.

Q. At the expiration of that year what did you do?

A. I was given a passenger engine. Well, sir, I don't remember whether I was given a passenger engine at that time or whether it was some other; I fired extras, I guess, to different engineers.

Q. After you had worked a year and a half with McDonough in the yard and a year on the road, then you worked as extra firemen with different engineers?

A. Yes, sir.

Q. When you were at work in the yard during the eighteen months you fired the switch-engine, did you?

A. Yes, sir.

Q. When you worked on the road what kind of an engine did you fire then?

A. Well, I fired engine number nine—a Baldwin engine; fired engine number nine for McDonough.

Q. That made two years and a half experience as fireman under McDonough; then you say you worked as extra fireman with different engineers?

A. Yes, sir.

Q. With whom did you work—can you remember?

209 A. I can't remember all of them.

Q. State some of them.

A. There was Richard Mills, a man by the name of Holland—men I was with some little time; then I fired a trip now and then for different men—I can't remember.

Q. Now, how long did you continue to act as extra fireman?

A. Until the next spring after that; I don't remember the date.

Q. What year would that be?

A. That would be '80.

Q. What did you do then, after that?

A. I was given a passenger engine—firing.

Q. Passenger engine on the road?

A. Yes, sir.

Q. As engineer?

A. As fireman.

Q. How long did you work as fireman on the passenger engine?

A. About eighteen months.

Q. With what engineers did you work on that passenger engine?
A. John Teede, most of the time.
Q. After these eighteen months that you worked as fireman on a passenger engine what did you do next?
A. I was dispatcher at the round-house, taking charge of the engines that came in off from the road and getting the engines out for the engineers going out.
Q. Had charge of all the engines as they came in and getting them ready to go out?
A. Yes, sir.
Q. What was your next employment?
A. I was promoted to engineer of a switch-engine.
Q. When was that, that happened?
A. That was two years ago this last March.
Q. Where were you at work with your switch-engine?
210 A. In the Fargo yard.
Q. Now, how many years altogether before you was given this switch-engine as engineer had you worked as fireman under other engineers?
A. Well, I calculate about four years and a half.
Q. About four years and a half as fireman under other engineers?
A. Four and a half or five years; I don't know just exactly the time.
Q. What were your duties as switch-engineer in this yard here?
A. To perform the duties of an engineer and run the engine.
Q. What did they consist of?
A. Well, it is something that would be pretty hard to tell without taking you right there and showing you.
Q. Did it consist in shifting cars?
A. Yes, sir.
Q. Almost exclusively?
A. Exclusively.
Q. What was the number of the switch-engine that you had?
A. Engine number 52.
Q. Was she the engine you run during all the time you were in the yard?
A. No, sir.
Q. What other engines did you run?
A. I run number eleven and number fourteen—oh, I don't know. I run a number of different ones. She was the one I had most of the time.
Q. What kind of an engine was 52?
A. It was a Baldwin engine, built expressly for switch work—for yard work.
Q. Do you remember the time Richard Mares was hurt?
A. Yes, sir.
Q. How long had you known him before he was hurt?
211 A. Just the time he had been in the yard; that I can't remember myself, how long it was, but I suppose it was two weeks; I presume he is correct about that.

Q. Had he worked with you and you with him during those two weeks most of the time?

A. I think not. I think he worked nights all the time. I worked one week nights and one week days.

Q. Well, do you remember how it was the week he was hurt; had he worked with you the whole of that week?

A. He had worked part of the week, that it was. We changed on Sunday evening. I don't know what day of the week it occurred; whatever day it was I had worked with him that length of time—from Sunday to that time.

Q. To the time he was hurt?

A. Yes, sir.

Q. Had you worked with him previously?

A. Well, I couldn't say that, previously. He might have come on in the latter part of the week; previous— that I was on nights. I couldn't say that.

Q. Do you remember the occasion when he was hurt?

A. I do.

Q. Well, won't you please state what happened then and there, what was done, in your own way? State it distinctly so the jurors can hear it.

A. Well, somewhere about four o'clock in the morning I was woke up to go down and take out part of a train we had made up to go west and switch it out and get some more cars that was down on a track they call number five to place on this train, and I asked him what the trouble was, why they couldn't make up the trains right in the first place——

Q. Whereabouts were you asleep?

A. We were on the Headquarters track; that was our usual place to lay up. I asked him how it was——

212 Q. Asked who?

A. Mares.

Q. Mares came and requested you to go?

A. He came and waked me up, told me what we had got to do. I asked him how it was he couldn't make those trains up right in the first place. He said damned if knew; he wasn't running the yard.

Q. You simply inquired why they couldn't be made up right in the first place?

A. Yes, sir; we used to have lots of such work to do—had to do work over the second time.

Q. Before you had gone to sleep you had been at work all the night in the yard, had you?

A. I couldn't say as to that; I had been there all night.

Q. What time did you go on duty that night?

A. Six o'clock.

Q. You had been on duty continuously from six o'clock until what time before you went to sleep?

A. Well, I don't know how long we had been asleep.

Q. About what time was it you pulled up to the Headquarters track and went to sleep?

A. That I can't remember.

Q. Was it long before you were aroused or a short time?

A. It might have been twelve o'clock or two o'clock; I can't say how long we had been there. Of course, there was nothing to bring it to my mind what we were doing before or anything about it. The circumstances that occurred afterwards, of course, impressed themselves.

Q. Then you say, when Mares came to you and asked you to go down and take out these other cars, you merely inquired why the work hadn't been done properly in the first place?

A. Yes, sir.

Q. He said damned if he knew; he wasn't in charge of the yard?

A. Something like that.

213 Q. Was that all of what was called the altercation or dispute between you and him?

A. Yes, sir.

Q. Did you find any fault with him?

A. No, sir; I couldn't, because I knew he wasn't to blame for it.

Q. Did you use harsh or improper epithets towards him in any way?

A. No, sir; not meant for him.

Q. Did you have any ill feelings towards him?

A. No, sir.

Q. Did you use any other epithets than merely inquiring why the work hadn't been done properly in the first place?

A. No, sir; I don't think I did. Well, we went down to number three and took hold of the train there, and I can't remember myself whether we throwed out some cars and some back or whether we hitched onto those three and remained hold of them. It is my impression we took hold of a number of cars and throwed some out on number five and the rest back, and then coupled onto these on number three and started back—at any rate, I know that at the frog on number five we were very nearly stopped. There was where Mr. Mares got up on the first car from the engine. He climbed onto that car and gave the signal to back; no signal of any number of cars at all—just simply a signal to back up—and I started the train at a decent rate of speed, probably six miles an hour, run down eight or nine cars, then reversed the engine—she had been running there without steam—gave them a start, and let them run; then I thought it was time to reverse my engine——

Q. Was there any steam in the cylinder?

A. Not any, except what leaked into the cylinder.

Q. She had then been running how many cars without steam?

A. Some four or five cars. I reversed my engine then without giving her steam.

Q. You reversed your engine without steam, you say?

214 A. She was shut off; had been four or five cars. I reversed the engine and let her slack down to what I thought was right and then put her back again—reversed her back.

Q. What do you mean by putting her back again?

A. Put her in the back motion. She was running in the back motion; I reversed her ahead.

Q. You reversed your engine and she had been running three or four cars without steam?

A. Yes, sir.

Q. You reversed your engine and that reduced the motion, did it?

A. Yes, sir.

Q. Was there any steam in the cylinders?

A. No, sir.

Q. The cylinders, when an engine is reversed, act as an air-pump and the pressure of the air retards the engine?

A. Yes, sir.

Q. That is what you relied on to slack in this case?

A. Yes, sir; always acts that way.

Q. The reversal of the valves would make the cylinders act as an air-pump?

A. Well, it does——

Q. And the pressure of the atmosphere in the cylinders——

A. Slacks the speed.

Q. Then you say, after that had been done—how far had you run after reversing the engine before you put it the other way, where it was originally?

A. Well, I couldn't say; probably about a car-length; just about enough to slack them up so there wouldn't be any danger, supposing we struck. I didn't know where the cars was, and I was very certain he didn't, because he hadn't been down there; we hadn't been on that track that evening that I remember of.

Q. You say that signal that was given to you didn't indi-
215 cate any number of cars to move?

A. No, sir; I didn't know how far to move; he had gone out of sight. When he gave the signal to back up he walked right back over the train out of sight three cars, as is proved to be by the fact that he got hurt by falling off the back car; from there you can't see a signal on the engine. From three cars back of a box-car you can't see a signal on the engine unless it is given far enough out from the sides so you can see by the cars.

Q. This signal given by him to back up, was it given by him as he was climbing up the cars?

A. That was given just as he straightened up.

Q. That was given just as he was climbing up or getting up on the first car?

A. When he had reached the top of the car.

Q. Did you see any other signal except that one?

A. No, sir; I did not.

Q. Was there any other signal given you except the signal you saw at that time?

A. I couldn't swear to that; I didn't see any signal; he went out of sight. I didn't see any one's signal. This other man on the steps had no lantern—that is, McLean; he had been out somewhere there doing a job for himself and come back and stepped up on the step; had no lantern.

Q. Consequently the only signal that could have been given would have been one given by the plaintiff himself, Mr. Mares?

A. Yes, sir; McLean couldn't have seen his signal from where he stood anyway, because it was on a curve—a left-hand curve—and he was on the left-hand side of the curve; on the other side of the curve.

Q. He was on the south side?

A. No, sir; he was on the north side, and he couldn't see the signals given from the hindermost car, given on his side, because a man would have to reach out four or five feet to give a signal

216 to be seen from that place.

Q. Upon which side of the engine did you sit as they were backing?

A. The north side.

Q. And could you see any person standing up on the rear or middle of the hind or rear car or the car furtherest ahead if he had given you any signals?

A. I couldn't from my seat; couldn't see a person give a signal from the rear car in any manner unless it was given out on the side, and that could not be done on my side, because the curve wouldn't admit of it; the curve was the other way; the curve was a left-hand curve.

Q. The curve was around towards the south?

A. Yes, sir.

Q. And the rear end of these cars, the end upon which Mr. Mares stood, as he says, was considerably further south than the engine?

A. Yes, sir; I think it would be four or five feet.

Q That would bring the rear car around so far that no person sitting on the engineer's seat could see what was occurring on the back end of that car?

A. No, sir.

Q. You say before you made the reversal of the engine you had been running five or six miles an hour. After you had reversed the engine and slowed down about what rate were you running then?

A Oh, about as a person would walk—three or four miles an hour. I expected to meet cars within two car-lengths of that time.

Q. That is, you were prepared to do it?

A. Yes, sir.

Q. You didn't know what was in the rear, and you were preparing yourself to meet them close at hand?

A. Yes, sir.

Q. Were you expecting another signal when you approached the cars?

217 A. I had reason to expect one.

Q. You were preparing for that whenever it should come?

A. Yes, sir.

Q. Now, after you had reversed the engine and then put it back where it was before, you gave it steam again, as I understand you to say?

A. No, sir; I checked my speed; if I hadn't wanted to go slow I wouldn't have checked it.

Q. You didn't put on steam at all?

A. No, sir; of course the air that's compressed in the cylinders

would make two or three exhausts—would give the train a very little start again; a very little.

Q. The process, then, of reversing the engine would suck up the air into the cylinders and compress it there?

A. Yes, sir.

Q. The process of sucking up the air through the cylinder-cocks would be what would retard the motion, would it?

A. The vacuum.

Q. That process would suck up some air and fill the cylinders, would it not, from the steam chests and pipe, and that's what you relied upon—that pressure of air that would be drawn in for the retarding of the engine?

A. Yes, sir.

Q. What next happened?

A. Shortly after I had reversed the engine back again the fireman called to me that Dick was killed; I reversed my engine and gave her steam at once.

Q. At that time you reversed your engine and gave her steam?

A. Yes, sir; I thought he was still under the train; of course I couldn't see him anyway until the head-light struck him. The head-light was on the back end of the tank, but, of course, the cars was close up to it. When that light struck him the fireman saw
218 him and hollered to me. I reversed the engine at once and gave her steam, and the engine stopped—the cab just about opposite the man. I had to stop and work the steam out of my cylinders before I could leave the engine; she wouldn't stand still. As quick as I done that I jumped down.

Q. You speak about the head-light showing on the ground; is there any difference in regard to head-lights between switch-engines and road-engines?

A. No, sir; there is a difference the way this one was placed; that's all.

Q. Is it a fact that the yard-engines have two head-lights?

A. Yes, sir.

Q. Have one in the rear on the back end of the tender and another in front, the same as ordinary road-engines?

A. Yes, sir.

Q. That is so they can run either way in the yard?

A. Yes, sir.

Q. Right up against the rear head-light was this freight car?

A. Yes, sir.

Q. So that the head-light, instead of throwing the light in front, would only throw the light to the side?

A. Yes, sir.

Q. And when the head-light came down on the side onto this man your fireman called out?

A. Yes, sir; I suppose that was the time. I know he saw him, and it must have been just about the time that light struck him, because it took me about half a car-length to stop the train—about that, I guess.

Q. Now, that second stop, when you reversed the engine and gave

it steam, state if that was the first time the engine had had steam for a number of car-lengths.

A. It was the first time she had had steam since I gave her a start—when he gave me the signal to start up.

Q. When you were near the switch?

219 A. Yes, sir.

Q. State if that stop you made, as you have stated, after Mares was discovered—state if that was sudden or gradual.

A. It was sudden; stopped just as quick as I could, because I thought he was still under the train.

Q. Well, you may state if you made any other sudden stop or check of speed except this last one, when Mares was discovered lying on the ground.

A. I made no sudden stop—no stop at all; checked the speed of the train; that was all.

Q. You say as soon as you could work the steam out of the cylinders so that the engine would stop, you got down, too?

A. Yes, sir.

Q. Did you go to Mares?

A. I did. I found him lying on the ground; found him lying there, sitting drawn up against the other track.

Q. Who were there when you got there?

A. Nobody but my fireman.

Q. Your fireman had got there first?

A. He jumped down right away; he spoke to me and then jumped down.

Q. Mr. Galvin wasn't there?

A. No, sir; he wasn't there.

Q. How long was it before Mr. Galvin had come up?

A. I don't know just how long it was, but we called to him and he came.

Q. He didn't come until you called for him?

A. No, sir; he wasn't there. He must have been coming; he must have heard something about it. He wasn't there until we got down. We made a call for him.

Q. Do you remember what the call was and who made it?

A. No, sir.

220 Q. You shouted out his name, some of you?

A. I think it was the fireman; perhaps McLean. McLean was there shortly after I was.

Q. McLean was there shortly after that happened?

A. Yes, sir; McLean, I think, was the third person there.

Q. McLean was standing on the opposite side from where Mares was lying on the ground, was he?

A. Yes, sir.

Q. Well, what was done with Mares?

A. We took a cushion off the engine; it was a cushion made of a board with springs in it; we put Mares on it and put him on the front of the engine.

Q. The engineers or fireman went in the engine?

A. I think it was the fireman.

Q. You took the cushion off his seat and put it under?
A. Yes, sir.
Q. Did he have any other support?
A. I think we took some other cushions. We used this one as a stretcher, because it had boards to support it; it was built on a board frame; the springs was between that and the cushion.
Q. Then it operated as a stretcher itself?
A. Yes, sir.
Q. Then what did you do with him?
A. Put him on the front end of the engine and carried him to the depot, to the Headquarters Hotel.
Q. Well, now, there has been something said about some conversation that you and Mr. Mares had when Mr. Mares was lying on the ground; won't you please state what he said?
A. I asked him how it happened. He says, "It's your monkeying." I told him it was a damned lie.
Q. He said, "It's your monkeying?"
A. Yes, sir; that's the very word he used. He says, "It's
221 your monkeying did it."
Q. Did he state how?
A. No; not at that time.
Q. Well, did you see him afterwards?
A. I did, at the Headquarters.
Q. After you had taken him up to the Headquarters?
A. Yes, sir.
Q. Was this after he was in the Headquarters or while he was lying out on the steps?
A. While he was on the stretcher or was on the truck.
Q. That's when you were waiting to get in the house?
A. Yes, sir.
Q. Now, what was said at that second conversation?
A. Well, I went to him—I was with him all the time—and I spoke to him about what I had said in the yard about being so hasty in speaking.
Q. I ask you what Mr. Mares said as to the cause of his hurt?
A. I spoke to him about the way I had spoke to him down in the yard—about using such rough language to him when he was in that condition. I was very sorry for it——

(The plaintiff objects to this conversation upon the ground that it is incompetent; which objection is overruled by the court; to which ruling the plaintiff duly excepts.)

(The plaintiff objects to this witness going on and giving any statement that he went on and made to Mares at that time in answer to this question, unless that statement amounted merely to a question and the answer to the question.)

Q. You may go on and state what was said in that conversation.

(The plaintiff moves the court to strike out from this witness' testimony what this witness has stated about what he said to Mares by way of confession and apology, and the court rules that the wit-

ness may state what was said between them there at that particular time; to which ruling the plaintiff duly excepts.)

222 A. I told him that his accusation against me at that time, when I had done nothing that I considered out of the way, put me in such a way that it slipped my lips before I took a second thought how he was placed, and then he says, "It's all right, Arthur." He says, "It wasn't your fault; I stepped off the back end of the train." Says he, "I thought there were more cars there."

By WILSON:

Q. Just give me this last, so that I can take it down. You stated to him that; what?

A. I stated to him that his accusation against me, when I felt that I had done nothing out of the way—that it made me feel so that I spoke without thinking of what condition he was in, and he says, "It's all right, Arthur." He says, "I stepped off the back end of the train." He says, "I thought there were more cars there."

Q. Did he say anything about its being his own fault?

A. Yes; he said it was his own fault; that's what he said at that time.

Q. I will ask you if you ever had any conversation with him about the matter subsequently?

A. I have.

Q. Have you seen him at any time since?

A. I have seen him; it's, I think, about a year ago—a year ago next month, I think it was. I saw him twice, I think, in the month of June a year ago.

Q. Now, after you had that conversation, he was carried in, was he, to the Headquarters Hotel?

A. Yes, sir.

Q. About how long after he was picked up was it that this conversation was had?

A. Well, I couldn't give the time at all—somewhere within half an hour; we was all more or less excited.

Q. Now let me ask you in regard to some of the customs of switching in the yards. In switching in the yards is it the practice
223 to use brakes for the purpose of stopping or checking the motion of the cars?

A. Not when they are attached to the engine, unless there is some danger.

Q. Not when they are attached to the engine, unless there is some danger?

A. No, sir.

Q. Who does the checking of the speed in such cases?

A. The engineer.

Q. In what manner?

A. By reversing his engine.

Q. State if the reversing of the engine in such cases is a common or uncommon practice.

A. It is very common.

Q. State if that is the only way in which it can be conveniently done—that work.

A. It is the only way it can be done that I know of.

Q. You may state if switch-engines are constructed with a view of being capable of being reversed rapidly—if they are specially constructed for that purpose.

A. Well, they ain't made particularly that way. Of course, the pattern under which they are made is smaller than the common-sized engines—that is, road-engines—and consequently more easily handled.

Q. That makes them more rapidly handled?

A. No more rapidly, of course; it depends upon a man's will.

Q. I will ask you if the engine was reversed upon this occasion when Mares fell off the cars, or stepped off or got off, in any manner differently from what is customary to reverse engines in switching in the yard?

A. No, sir.

Q. State if anything was done there that was unusual or out of the usual course and practice in such cases.

A. It was not out of the usual course. We usually give
224 them a little steam when we reverse.

Q. Then you didn't stop as fast as usual that time?

A. No, sir; I didn't give the engine any steam, because I didn't know how far we had to run; the speed was checked to a safe speed to let her run.

Q. What you were doing was to prefer for a safe strike of the cars whenever they should come there. In your judgment, was that slowing up of speed necessary at that time?

A. It was.

Q. It was in the exercise of good judgment as an engineer?

A. Yes, sir.

Q. And requisite for the safety of the engine and cars?

A. That's what I supposed.

Q. Had you any other reason for reversing the engine or slowing the engine except that?

A. Well, I had the reason that I found that I couldn't depend on all the men in the yard to give signals to me.

Q. Had you any other desire in slowing the engine than merely to look out for the safety of all concerned?

A. None, sir.

Q. Had you any malice or did you do that from malice towards anybody at all?

A. No, sir.

Q. Nor from ill temper towards anybody?

A. No, sir.

Q. Were you ill tempered at that time?

A. I was quick-tempered.

Q. Were you angry at that time—at the time you did that?

A. No, sir.

Q. Not angry towards anybody?

A. No, sir.

Q. Was there at that time, or has there been since, any rule
225 in force in this yard by which the right to determine the speed of the engine has been taken away from the engineer and given to the brakeman when he gives the signals?

A. No, sir; never.

Q. It was always left to the engineer's judgment the speed at which he will run through the yard in any case?

A. Of course, he is governed a good deal by the signals given him.

Q. But the signals don't tell him what speed to use?

A. No, sir.

Q. Now, suppose that there had been a signal given to you by Mares, as he says, to back seven or eight cars, and you had seen that, was there any rule or practice by which you were bound to back at any particular rate of speed?

A. No, sir.

Q. But you were to use your own judgment as to the proper rate of speed to move the cars?

A. Always.

Q. Have you ever been guilty of any dangerous or reckless conduct since you have been employed in this yard, or while you were engaged in the yard, Mr. Bassett, in the management of your engine or hauling cars; were you guilty of any reckless or dangerous conduct when you were handling cars in this yard in the use of your engine at any time?

A. No, sir; I don't think that I was—what I considered. Of course, we have had accidents in the yard, a number of them.

Q. Was that unusual, to have accidents in the yard?

A. No, sir.

Q. How long do you say you have worked in this yard?

A. I had worked in this yard then about eight months.

Q. I mean firing and altogether.

A. That would make just about twenty months I had worked in this yard.

226 Q. You had worked in this yard, fireman and engineer both together, about twenty months?

A. Yes, sir.

Q. And you had seen the character of the work done?

A. Yes, sir.

Q. You may state whether you know Daniel Galvin, who was yardmaster here.

A. I am pretty well acquainted with him.

Q. You may state if he was yardmaster at the time you were at work in the yard.

A. He was night yardmaster.

Q. State if you had to come in contact with him frequently as yardmaster.

A. What do I understand by that question?

Q. As engineer did you come in contact with him frequently while he was acting as yardmaster?

A. I don't believe I understand it quite now.

Q. When you were running your engine in the yard was he acting as yardmaster and working with you often?

A. Yes, sir.

Q. State whether you ever had any difficulty with him.

(The plaintiff objects to this question upon the ground that it is incompetent and immaterial, and the court says, "You can show, Mr. Clough, anything that will affect his testimony as an expert or show feeling on his part, but to try his character generally, you wouldn't be permitted to do that;" to which ruling of the court the plaintiff duly excepts.)

Q. Mr. Bassett, I will ask you if you ever had any words or ill feeling with Mr. Galvin?

A. Never.

Q. Never had any with him?

A. No, sir; except this one evening he spoke about him-
227 self—except the time Mares was hurt.

Q. Now, I will ask you if Mr. Galvin ever at any time reprimanded you or complained to you of any reckless work in the yard?

A. He complained of my not getting around and doing the work.

Q. That is, that you were too slow?

A. Sometimes, and occasionally for striking the cars too hard.

Q. Well, was there anything unusual, so far as engineers go, in that particular?

A. Well, it wasn't unusual in this yard at that time.

Q. While you were in it? (By Wilson.)

A. Well, for other reasons than that I was in it.

Q. While you were in this yard how many switch-engines were there?

A. Two in the daytime and one at night at that time.

Q. State, without regard to this yard, in regard to engineers, whether that's not a thing that happens with the best of engineers.

A. Yes, sir.

Q. The best engineers break cars occasionally, do they, or bump them together?

A. They strike them too hard occasionally.

Q. There is nothing unusual about that among the best engineers, is there, so far as your observation goes?

A. Not when they have poor men to work with.

Q. What has been the character of the engineers with whom you have worked as engineers?

A. I think it has been good.

Q. Reputable men as engineers?

A. I never tried to sift their character at all.

Q. I mean as engineers; what was their character as engineers—as skillful, careful engineers?

A. Those that I associated with were considered good engineers.

Q. Something was said, if I remember correctly, by one of
228 the witnesses about your running off the switch at one time.

A. Yes, sir.

Q. Will you please state that—the circumstances concerning that?

A. I don't know what he refers to.

Q. He refers to some time when you were ordered to go up and take some passengers coming in on a stock train and bring them down to take a passenger train.

A. At this time you speak of there was a stock train coming in from the west, and they wanted to get unloaded as quick as possible. I was at that time standing on the track south of the Headquarters Hotel, the furthest track south; there was a car on the switch; I was at the end of it. They wanted me to go up to the stock-yards when that train came in and spend two or three hours. After they put me in there and told me what there was to do I told them I hadn't water enough; consequently would have to go down and get it before that train came in or would be blocked, because there was an eastern train on the other track, so I went out onto the main track and got water. Mr. McLean was on the engine; McLean and another man; I don't know what his name was; Mr. McLean was in the cab. We took water and came back up, and we reached the switch east of the Headquarters Hotel; I slowed up; Galvin, the yardmaster, stood at that switch, and the train from the west was this side of the round-house somewhere, and I thought it wasn't hardly safe to go up there and try to get in on the other end of the track. I slacked the speed and he gave me the signal to go ahead; repeated the signal like that, which is the signal to hurry up.

Q. Was that a signal to move rapidly?

A. Yes, sir.

Q. You were about to slack up and not make the run?

A. Yes, sir.

Q. The yardmaster signalled you to move rapidly?

A. Yes, sir. I made the run; I got up there; the switchman jumped off the step; I was going pretty rapid; he didn't
229 strike and take a stand immediately. As the other engine was right onto me almost I couldn't stand there; I had to start back to avoid a collision; and he didn't—well, he got the switch over and got the pin in, but the rails weren't fitted very well; they stood like that, one a little by the other; the tank went over all right, but when the drivers struck that with no leader they clum the rail and went off the track.

Q. What you did was by virtue of the orders you have mentioned, by the yardmaster, to hurry up?

A. It was a signal to go ahead.

Q. And contrary to your wishes?

A. Yes, sir; I didn't think at first that I could do it.

Q. Now, you may state whether, when you were switching in this yard, any injury was done either to persons or property by any negligence or fault on your part?

A. There has been persons hurt, but I don't think nothing from any fault of mine; there has never been any other accusation against me or anybody claimed they got hurt through my fault—that is, with the exception of Mares.

Q. Mares is the only man who ever claimed he got hurt by any fault or neglect of yours?

A. Yes, sir. Well, there was one other man, but I can plainly see how he got hurt.

Q. You may state that.

A. Well, he got hurt coupling—got a finger pinched; that was all. These draw-heads, the way they are made, they are placed between two timbers, like that, the draw-head in the middle; on top of them is a cap coming down level with the bottom of the car. These draw-heads, when driven back, strike against that cap by being driven in too far. This man was making a coupling, and the pins—they have a head on them to keep them from falling through. He takes this pin right around the head that way. Instead of taking it this way, as is customary, he took around the head that way.

230 Q. When you struck the car it drove the draw-head back and pinched his finger, and because that did happen he blamed you for it?

A. Yes; when it was his own fault; an improper way to take hold of the pin.

Q. When did that happen—before or after Mares was hurt?

A. This happened before.

Q. With the exception of that one man and Mares has anybody ever accused you of hurting anybody else as engineer?

A. No, sir; not that I have ever heard of.

Cross-examination by THOMAS WILSON:

Q. Mr. Witness, how long did you act in this yard or anywhere as engineer?

A. I commenced in March, two years ago this last March, and I run until—I think I commenced in the first part of the month and I was discharged the latter part of the month.

Q. The latter part of March?

A. Yes, sir; the March following.

Q. That is, you commenced in March, '81, and were discharged in the latter part of the month, after you had run about a month?

A. No, sir. I said the year following.

Q. Then you were there about a year?

A. Yes, sir.

Q. A trifle over. During that time how often were you suspended?

A. I was suspended twice.

Q. When you finally stopped you were discharged?

A. Yes, sir.

Q. Have never been taken into their service since?

A. No, sir.

Q. Who is the person that discharged you and suspended you?

A. Mr. Rupert.

Q. Who is Mr. Rupert?

231 A. He was acting master mechanic.

Q. The master mechanic of the Northern Pacific railroad?

A. The division master mechanic.

Q. At Fargo?

A. At Fargo.
Q. He has charge of all these things?
A. Yes, sir.
Q. And is still master mechanic of the Northern Pacific railroad at Fargo and here?
A. Yes, sir.
Q. And is present to-day?
A. I believe so.
Q. And he knows what you were discharged for?
A. Yes, sir.
Q. And he knows what you were suspended for, don't he?
A. I think so.
Q. You were suspended twice for how long a time?
A. About thirty days at one time and fourteen or fifteen the other time?
Q. And the last time they turned you off and didn't take you back at all?
A. Yes, sir.
Q. And that's the only time you ever acted as engineer. Well, for a man that never did wrong you were treated pretty roughly, weren't you? Did you ever hear of any other man discharged and suspended so often during that length of service?
A. I don't know as I recollect of any instance.
Q. You don't think of any instance of that kind?
A. It's not shown what it is for yet.
Q. When you had this conversation with Richard Mares up there at that Headquarters who was present?
A. I don't know who was present.
232 Q. Was anybody present?
A. I wouldn't swear that there was not.
Q. Do you believe that the man that damned him a few minutes before when his legs were cut off was left alone with him there to have a confidential conversation at that time? Will you swear that the man that damned him a few minutes before just as his legs were cut off was left alone with him there before he was taken into that hotel to have a confidential conversation like that?
A. I don't know as I was alone with him at that time. I had been a number of times that evening.
Q. Will you swear that you was alone with him then?
A. I won't swear that I was alone with him then.
Q. Who was present if you were not alone?
A. It must have been some of the brakemen.
Q. It must have been?
A. I say if there was anybody.
Q. Those brakemen were whom?
A. McLean and one man's name I can't tell.
Q. Then, if anybody was there, McLean was there, was he?
A. I should judge so. I said I didn't know that there was anybody.
Q. Then either you were alone when you were having that conversation or else McLean was there?

A. I didn't say so.
Q. Is it so?
A. I said I didn't know whether he was or not.
Q. If he wasn't there was anybody there?
A. I don't know that; there was quite a number gathered around there after it was found that there was a man there hurt—people who were out late.
Q. You can't think of anybody that was there then?
A. Well, I know the railroad company's clerks was around
233 there; Mr. Fulton was around.
Q. We won't add to your troubles you had that year by troubling you further now.

ADAM RUPERT, called as a witness in behalf of the defendant, being first duly sworn, testifies as follows:

Direct examination by W. P. CLOUGH:

Q. What is your business, Mr. Rupert?
A. Master mechanic of the Dakota Division of the Northern Pacific railroad.
Q. What did you say your business was?
A. Master mechanic.
Q. In the employment of the Northern Pacific Railroad Company?
A. Yes, sir; the Dakota Division.
Q. How long have you occupied that position?
A. Since five years ago last February.
Q. As such master mechanic you may state whether it has been your duty to employ and discharge engineers and firemen.
A. Yes, sir.
Q. Both those that serve in the yard here and those that serve on the road?
A. Yes, sir.
Q. You may state if you know the witness who has just been on the stand, Mr. Arthur Bassett.
A. Yes, sir.
Q. When did you first become acquainted with him?
A. When I took charge of the division—five years ago; five years ago last February.
Q. What did he do then?
A. He was employed as fireman on the road.
Q. Who employed him?
A. He was employed before I came here.
234 Q. When you came here you found him one of the employees—fireman on the road?
A. Yes, sir.
Q. On what sort of an engine?
A. I couldn't say; he was extra then.
Q. He was extra?
A. Yes, sir.
Q. Had he been employed at that time as fireman in the yard?
A. I believe he had.

Q. Not under your administration?
A. No, sir.
Q. How long did he remain as extra fireman out on the road?
A. Well, I couldn't hardly tell that.
Q. Did he work with several engineers?
A. Yes, sir.
Q. After he had finished that business of extra fireman how did he work?
A. He fired freight for awhile, then fired passenger.
Q. Regular?
A. Yes, sir.
Q. How long did he fire passenger?
A. I couldn't state that particularly; quite awhile.
Q. Well, after he had got through firing on freight and passenger, what other employment did he get?
A. He was promoted to dispatcher.
Q. What are the duties of dispatcher?
A. To bring the engines from the depot to the round-house.
Q. That gave him charge of all the engines here?
A. Yes, sir.
Q. And his duty was to get all the engines and bring them down?
A. Yes, sir.
Q. So that he was compelled and had to run all the en-
235 gines—every engine on the division?
A. Yes, sir.
Q. How many were there altogether at that time?
A. Well, there was several passenger engines.
Q. Was the most of his duty to take care of, to take charge of, them?
A. Particularly passenger engines; yes, sir.
Q. And how many were they in number?
A. There was four.
Q. He would receive those at the station——
A. And take them up to the round-house.
Q. Then, whenever they were desired to go out again, he would take them and bring them back again?
A. Yes, sir.
Q. So that involved his running each of those engines every day nearly, did it?
A. Yes, sir.
Q. Sometimes he would run more than one each day?
A. Yes, sir.
Q. About how many trips did that involve between the round-house and the station daily?
A. His time was on nights.
Q. Well, during each night?
A. Well, probably average four to six engines in the evening.
Q. Do you know how long he kept at that business of running engines in that way?
A. I couldn't say particularly; might have been six months.
Q. Well, what did he do after that?

A. He was promoted to switch engineer in the yard.
Q. What engine did you give him to run?
A. Well, he had several; engine 52, engine 11, and several others; we changed around considerable.
236 Q. And how long did he run those engines; what aggregate period?
A. Well, it was somewhere a year—from March to March.
Q. And he ceased to be in the company's service in March, 1882, did he?
A. Yes, sir.
Q. Then he worked under you as fireman and as engineer for four years?
A. Yes, sir.
Q. You may state if it was your duty to do so and if you did observe the character of his work as engineer and as fireman during that time.
A. He had always given satisfaction.
Q. I am asking you if you did observe it.
A. Yes, sir.
Q. Well, what was the character of his work as engineer and fireman?
A. It seemed to be satisfactory.
Q. State if you had the care of the engines and it was your duty to repair them and keep them in order.
A. Yes, sir.
Q. The engines that he run?
A. Yes, sir.
Q. If the engines had been abused or handled in a reckless manner state whether the machines themselves would have shown that abuse.
A. They would.
Q. That would have been the first place where it would have appeared—on the machinery itself—if it had been used in a reckless or abusive manner?
A. Yes, sir.
Q. State if you saw anything out of the way in the engines used by Mr. Bassett indicating they had been recklessly used and abused.
A. No; not more than any of our engineers.
Q. Of course, there is more or less wear and tear on an en-
237 gine, anyway?
A. More or less; yes, sir.
Q. You didn't notice anything unusual in regard to Mr. Bassett's engine?
A. No, sir.
Q. Now, you may state what experience you have had in the management of engines, and where.
A. Well, it's a good while back; since 1844—'43 when I first began.
Q. Forty-three years ago?
A. 1843.

Q. Where was that?
A. The Illinois Central.
Q. Were you engineer—locomotive engineer—on that road?
A. Not on that road.
Q. Have you ever been locomotive engineer on any road?
A. Yes, sir.
Q. My first experience was on the Louisville and Lexington, Lake Shore and Michigan, Michigan Central, and Northern Pacific.
A. Twenty-two years.
Q. In various parts of the country?
A. Yes, sir.
Q. You are acquainted with what constitutes a good engineer and careful work, are you?
A. Yes, sir.
Q. How would the work of Mr. Bassett, as an engineer for care and skill, compare with that of engineers in yards generally, from your knowledge? How would the work of Mr. Bassett, while he was employed by the Northern Pacific Railroad Company in the yard at Fargo, compare with that of reputable and skillful yard engineers generally?
A. He has given good satisfaction—as well as any man we had there.
Q. How does it compare generally with yard engineers?
238 A. He has done good service.
Q. He did good service?
A. Yes, sir.
Q. I will ask you if anybody while he was in the employment of this company in this yard ever made complaint to you of his doing anything to endanger the lives of the men at work with him in the yard or to injure the property of the company?
A. No.
Q. Never anything of that kind?
A. No, sir.
Q. You never heard any complaint of that character?
A. No, sir.
Q. State if you ever saw anything in Mr. Bassett's work about the yard of a character that would be reckless or dangerous to the men at work with him or to the property of the company.
A. I haven't been informed about it.
Q. You have been?
A. No, sir.
Q. I ask you if you did observe anything of the kind?
A. No, sir.
Q. How was Mr. Bassett regarded in respect to his qualifications as engineer for the yard—as a competent and careful man, or otherwise?
A. There has been a good deal—as a general thing there is found fault with every man in the yard, and I find he has given as good satisfaction as any we have there.
Q. What I mean is generally; not merely in respect to those you have there, but generally as an engineer.

A. He was promoted to switch engineer in the yard.
Q. What engine did you give him to run?
A. Well, he had several; engine 52, engine 11, and several others; we changed around considerable.
236 Q. And how long did he run those engines; what aggregate period?
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A. Yes, sir.
Q. You may state if it was your duty to do so and if you did observe the character of his work as engineer and as fireman during that time.
A. He had always given satisfaction.
Q. I am asking you if you did observe it.
A. Yes, sir.
Q. Well, what was the character of his work as engineer and fireman?
A. It seemed to be satisfactory.
Q. State if you had the care of the engines and it was your duty to repair them and keep them in order.
A. Yes, sir.
Q. The engines that he run?
A. Yes, sir.
Q. If the engines had been abused or handled in a reckless manner state whether the machines themselves would have shown that abuse.
A. They would.
Q. That would have been the first place where it would have appeared—on the machinery itself—if it had been used in a reckless or abusive manner?
A. Yes, sir.
Q. State if you saw anything out of the way in the engines used by Mr. Bassett indicating they had been recklessly used and abused.
A. No; not more than any of our engineers.
Q. Of course, there is more or less wear and tear on an en-
237 gine, anyway?
A. More or less; yes, sir.
Q. You didn't notice anything unusual in regard to Mr. Bassett's engine?
A. No, sir.
Q. Now, you may state what experience you have had in the management of engines, and where.
A. Well, it's a good while back; since 1844—'43 when I first began.
Q. Forty-three years ago?
A. 1843.

Q. Where was that?
A. The Illinois Central.
Q. Were you engineer—locomotive engineer—on that road?
A. Not on that road.
Q. Have you ever been locomotive engineer on any road?
A. Yes, sir.
Q. My first experience was on the Louisville and Lexington, Lake Shore and Michigan, Michigan Central, and Northern Pacific.
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Q. In various parts of the country?
A. Yes, sir.
Q. You are acquainted with what constitutes a good engineer and careful work, are you?
A. Yes, sir.
Q. How would the work of Mr. Bassett, as an engineer for care and skill, compare with that of engineers in yards generally, from your knowledge? How would the work of Mr. Bassett, while he was employed by the Northern Pacific Railroad Company in the yard at Fargo, compare with that of reputable and skillful yard engineers generally?
A. He has given good satisfaction—as well as any man we had there.
Q. How does it compare generally with yard engineers?
238 A. He has done good service.
Q. He did good service?
A. Yes, sir.
Q. I will ask you if anybody while he was in the employment of this company in this yard ever made complaint to you of his doing anything to endanger the lives of the men at work with him in the yard or to injure the property of the company?
A. No.
Q. Never anything of that kind?
A. No, sir.
Q. You never heard any complaint of that character?
A. No, sir.
Q. State if you ever saw anything in Mr. Bassett's work about the yard of a character that would be reckless or dangerous to the men at work with him or to the property of the company.
A. I haven't been informed about it.
Q. You have been?
A. No, sir.
Q. I ask you if you did observe anything of the kind?
A. No, sir.
Q. How was Mr. Bassett regarded in respect to his qualifications as engineer for the yard—as a competent and careful man, or otherwise?
A. There has been a good deal—as a general thing there is found fault with every man in the yard, and I find he has given as good satisfaction as any we have there.
Q. What I mean is generally; not merely in respect to those you have there, but generally as an engineer.

A. He has given good satisfaction.

Q. You say so from your long years of experience as an engineer?

A. Yes, sir.

Q. Are you acquainted with the rules by which the handling of engines and cars in the yard are governed; you must be, I suppose?

239 A. Yes, sir.

Q. Is there any rule which takes away from the engineer the right of exercising his own judgment as to the speed with which he shall handle cars in the yard?

A. There is no rule. The engineer generally uses his own judgment in regard to the speed.

Q. Have the brakemen in the yard any authority to dictate to the engineer as to the speed with which he shall handle cars?

A. They sometimes do. I don't know whether they have authority to or not.

Q. Well, do you know of their having any such authority or not?

A. I don't think they have.

Q. In your opinion, they haven't any such authority?

A. No, sir.

Q. For instance, if a signal were given to an engineer to back seven or eight cars in length by a brakeman, whose duty would it be to judge as to the proper rate of speed for doing that backing—the engineer or brakeman?

A. The engineer.

Q. It would be his duty to rely upon his own judgment as to the proper speed?

A. Yes, sir.

Q. In switching in the night what is the duty of the engineer in respect to keeping his engine always under control—night or daytime, as far as that is concerned?

A. I don't understand that.

Q. I say what is the duty in switching in the yard, at night particularly, in handling cars; what is the duty of the engineer in respect to keeping his engine always under his control so he can stop it any moment—any instant? Is it his duty to keep it under his control, or to let it go and depend upon somebody else?

A. Under his control.

240 Q. Is it his duty to have it running at such a rate of speed that he can stop it in an instant?

A. Yes, sir.

Q. And if it gets beyond the point where he can do that to check it to a point where he can?

A. Yes, sir.

Q. Is not his duty as engineer to always be expecting obstructions.

A. Yes, sir.

Q. Always looking out for them?

A. Yes, sir.

Q. Isn't that so to a greater extent in the yard moving about among standing cars than it is even on the road?

A. Yes, sir.

Q. What is the common method used in yards of checking engines and cars?

A. Generally by reversing the engine.

Q. Isn't that the nearly universal method in handling cars in the yard of checking their motion?

A. Everywhere.

Q. In this yard and elsewhere?

A. Yes, sir.

Q. What is the custom with regard to reversing her with steam in the cylinders or without?

A. It depends upon circumstances. If there is danger they use steam—shut off the steam, reverse the engine, and give her steam.

Q. Shut off the steam, reverse the engine, and give her steam at once?

A. Yes, sir.

Q. Are there any circumstances under which it is entirely proper to reverse the engine with steam on?

A. Yes, sir.

241 Q. State if those occasions happen frequently.

A. Very frequently, especially in the yard.

Q. It is not an uncommon practice by any means?

A. No, sir.

Q. Is that owing to the fact that it is necessary to move with promptness between standing objects?

A. It depends upon the signals given by the switchman.

Q. Suppose there is no signal given and in the judgment of the engineer it is desirable to check his speed suddenly, how does he do it?

A. There is a great many cases where the engineer can't see the end of the cars—maybe on a curve—no proper signal given, and he discovers that he is too near the train; he is obliged to reverse the engine before he shuts her off.

Q. In any case where the engineer thinks promptness is necessary it is entirely proper to reverse the engine?

A. Yes, sir.

Q. And he must use his judgment on all such occasions?

A. Yes, sir.

Q. His own judgment?

A. Yes, sir.

Q. Is it not always expected in yards of this kind and in running engines that the engineer will use his own judgment as to when it is proper or improper for him to check his speed?

A. Yes, sir.

Cross-examination by THOMAS WILSON:

Q. You say you have been how long master mechanic of this road?

A. Since February five years ago.

Q. Do you know General Wilson here, — sits by me?

A. I have met him occasionally; yes, sir.

Q. Let me read to you some questions now, and you listen to them, please, carefully and give me an answer.

242 A. Yes, sir.

Q. Did you not say to George P. Wilson, on last Saturday afternoon, at your office up at the round-house in this city, that engineer Bassett had been discharged from the defendant's service as engineer for recklessness and incompetency? Answer that yes or no.

A. I said that I supposed that was the case.

Q. Did you or did you not—now I put this question squarely: Did you or did you not say to George P. Wilson, on last Saturday afternoon, at your office up at the round-house in this city, that engineer Bassett had been discharged from the defendant's service as engineer for recklessness and incompetency? Did you or did you not say that to him then and there?

A. I didn't say that he was discharged for incompetency. I said I thought he was, only we had it on the record. I hadn't the record when he was there.

Q. You say you didn't say this?

A. No, sir.

Q. Did you or did you not say to him, at the same time and place, that a good many reports came in that he was a dangerous man and would kill somebody?

A. No, sir.

Q. Didn't George P. Wilson, at the same time and place, ask you to look up and see when Bassett was discharged?

A. Yes, sir.

Q. Did you not afterwards, on Monday of this week, inform Wilson that it was in September, '81, that he, Bassett, was discharged?

A. He was suspended at that time. He left the service at that time.

Q. Did you not afterwards, in pursuance of his request to you at the time before stated, on Monday of this week, in the court-room, inform said George P. Wilson that it was in September, '81, that he, Bassett, was discharged?

243 A. I said Mr. Bassett was suspended at that time; that was the time he run off the switch; but since that time I instructed Mr. Wilson. I said yes under the circumstances. I wasn't positive whether it was discharged or suspended.

Q. But didn't you fix this date for him at that time?

A. I merely took it off from the certificate—pay certificate—that was given him at that time.

Q. You swear positively now before this jury that you didn't say to George P. Wilson, on last Saturday afternoon, at your office up at the round-house in this city, that engineer Bassett had been discharged from the defendant's service as engineer for recklessness and incompetency?

A. I said I thought that was the case; we had it on record. I told him I would look up the matter for him just as soon as I got time to do it.

Q. Well, then, if you said to him at that time you thought that was the case, you did think so then, didn't you?

A. Well, we have a number of cases of this kind——

Q. If you told George P. Wilson, on last Saturday, at the round-house, that you thought that Bassett was discharged for recklessness and incompetency, you did think so then, didn't you?

A. We had a number of cases at that time——

(By the COURT:) Answer yes or no.

Q. If you did tell Wilson at that time that you thought he was discharged for recklessness and incompetency, you did, then, think so, didn't you?

A. I thought so.

Q. Well, you were the man that had discharged him, weren't you?

A. No, sir; I had instructions to discharge him.

Q. Ain't you the man that discharged and employed engineers here?

A. Yes, sir; by instructions of the superintendent.

Q. You are the man who did and you believed that was the fact, didn't you, at the time you said so to Wilson?

244 A. No, sir; I didn't say it was a fact; I said I thought so.

Q. Well, you did think so, didn't you?

A. I thought so; yes.

Q. That was before Mr. Clough and the attorneys had talked to you about this case, wasn't it?

A. No, sir.

Q. On that side?

A. No, sir.

Q. It wasn't?

A. No, sir; I hadn't seen Mr. Clough nor any of the parties, or any one connected with the circumstances.

Q. That's what I say; you made this answer to Mr. Wilson before the attorneys connected with this case had talked to you?

A. Yes, sir.

Q. Mr. Wilson went there to inquire about it and you made him these answers?

A. Yes, sir.

Q. Since that time your memory has changed, and now you say that there has not been a word said about him, and that he was as good as anybody?

A. After looking over the records I find I was mistaken.

Q. And you are swearing now, as a fact, and you have before this jury that he did as well as anybody. You have sworn that right here; how has your recollection changed so suddenly since last Saturday—not your record, but your recollection; how has it changed so suddenly since last Saturday?

A. We have a good many men discharged; I can't bear in mind just the special parties.

Q. Wasn't your memory about as good last Saturday afternoon, when George P. Wilson called your attention directly to this case, as it is now; wasn't your memory about as good then as it is now?

A. I stated the facts.

245 Q. Well, but you stated to him then that your memory was then that that man had been discharged for recklessness and incompetency; wasn't your memory about as good then as now?

A. I told Mr. Wilson I would look up the record.

Q. I am asking you if your memory about that fact when he asked you last Saturday wasn't about as good as now.

A. Yes, sir.

Q. Your memory was then that he had been discharged for those reasons; and didn't you say also that a good many reports came in there that he was a dangerous man and would kill somebody; now will you swear positively that you didn't tell George P. Wilson last Saturday that thing, or words to that effect?

A. No, sir; not anything to that effect.

Q. You swear positively to that, do you?

A. No, sir; I didn't say it.

Q. Didn't say anything of that kind?

A. I said I thought the man was discharged for incompetency.

Q. Did you not at that time say in those very words, or words to that effect, that a good many reports came in that he was a dangerous man and would kill somebody?

A. I deny that.

Q. Do you say you said nothing like that to George P. Wilson?

A. I deny it. I said I thought Mr. Bassett was discharged for incompetency.

Q. Do you swear positively that you didn't say that or anything to that effect at that time and place?

A. Yes, sir; I deny it.

Q. You say that time when Wilson asked you was before the attorneys for the defendant had called on you in this case?

A. Yes, sir.

Q. Well, now, are you swearing from your record or your memory at this time, what you swear before this jury?

246 A. I swear in regard to his dismissal.

Q. No, but you are swearing now, when you swear to this jury, from your memory or from your record?

A. From my memory.

Q. Altogether?

A. Not altogether. What you have stated I swear by what I found on the record afterwards.

Q. You don't deny but what you did suspend this man twice and discharge him once?

A. Not through my office, sir.

Q. Well, somebody did, didn't they?

A. Yes, sir.

Q. Then you don't know how that was done, nor for what?

A. I know how it was done.

Q. Do you know what it was done for?

A. Yes, sir.

Q. It wasn't done through your office, you say?

A. I said the man wasn't discharged by my office.
Q. Then you didn't do it or cause it to be done?
A. No, sir; I didn't cause it to be done.
Q. Who did cause it?
A. The superintendent.
Q. Who is that?
A. Mr. Hobart.
Q. Hobart isn't here, is he?
A. I don't know whether he is or not.
Q. Now, Mr. Witness, if last Saturday you believed, according to your best recollection, that he had been discharged *from* recklessness and incompetency—that was your memory then—how do you come to remember now that he always gave satisfaction? If you then remembered he had been discharged for recklessness and incompetency how do you remember that he always gave satisfaction? Look
247 at the jury and answer that. If you then remembered he had been discharged for recklessness and incompetency how do you remember he always gave satisfaction?
A. Mr. Bassett has been employed for years as a locomotive engineer. If he had been incompetent and negligent he would have been discharged before.
Q. Did you ever know a man in your life that was discharged any oftener or quicker, one after the other, than Bassett? If so, tell me the fellow.
A. The court don't understand, probably, that there is a great deal of injustice done to men sometimes.
Q. You say now that the reason you remember that he always gave satisfaction is that if he hadn't been a good man he would have been discharged before. I ask you now to tell the jury if you ever knew of a man that was discharged oftener, and you say sometimes injustice is done. If you have any other explanation to give to the jury why you now remember Mr. Bassett always gave satisfaction, when last Saturday your recollection was he was discharged for incompetency and recklessness, you may tell them.
A. I didn't state that Mr. Bassett was discharged for incompetency.
Q. Didn't you state to me here a few moments ago that your recollection then was that he was discharged for recklessness and incompetency?
A. I said before that I didn't say that I was positive.
Q. Did you not state to me a few moments ago that you stated to General Wilson last Saturday that your recollection then was that he was discharged for recklessness and incompetency?
A. I did not say recollection; I said I thought.
Q. You said you thought?
A. Yes, sir.
Q. Well, if you last Saturday thought he was discharged for recklessness and incompetency how do you come to recollect that he always gave satisfaction? Now, explain that to the jury.
248 A. He has always given satisfaction to my knowledge, so far as I know.

Q. Last Saturday you admit you said to George P. Wilson that you thought he was discharged for recklessness and incompetency; now you state he always gave satisfaction. I want you to state to the jury how you come to so state now, when you thought last Saturday otherwise.

A. For the reason I looked to the record.

Q. Will you please state to the jury and to this court whether your record shows that he always gave satisfaction?

A. We have a memorandum; yes, sir.

Q. Does that record show that he always gave satisfaction?

A. No, sir.

Q. Then how does it make you remember that he always did give satisfaction if that record don't show so?

A. For the reason I have been in the yard every day.

Q. That's not in the record; it's what you saw?

A. Yes, sir; its my remembrance.

Q. Now, then, it was because you was in the yard every day. Now, if you were in the yard every day and saw that man, how comes it that last Saturday you said you thought he was discharged for recklessness and incompetency?

A. I supposed he was.

Q. How did you come last Saturday to suppose that if you had been in the yard every day and saw him—how did you come to make such an awful mistake, then?

A. I was busy at the time; very busy.

Q. You were not too busy to tell the truth, were you, to George P. Wilson?

A. Oh, last Saturday; I thought you were referring to when he was at the office; I hadn't looked over the record at that time.

Q. You have just stated to this jury that the record didn't say a thing about it. That didn't refresh your memory. Your
249 memory is because you had been in the yard every day. If you remember he was a first-class man from being in the yard every day and seeing him how comes it that you had so far forgotten that as to tell George P. Wilson last Saturday you thought he was discharged for incompetency and recklessness?

A. I didn't say that to Mr. Wilson last Saturday. Mr. Wilson asked me if I had looked over the record of the man being discharged. I told him I thought it was September.

Q. Didn't you swear to me within the last ten minutes you said to George P. Wilson last Saturday you thought the man was discharged for recklessness and incompetency; didn't you swear before this jury within the last ten minutes? If you don't wish to answer the question I will leave it.

Q. Do you mean to say that you notice every engine that comes into that shop up there?

A. Nearly every one.

Q. Yourself?

A. Yes, myself; that's my business.

Q. Now, you state before this jury, as a matter of fact, that an

engineer must rely on his own judgment as to when he will stop and how fast he will run?

A. Yes, sir.

Q. Now, in the night, when an engineer is backing down a side track, you do state positively that the engineer must rely on his own judgment how fast he will run and when he will stop?

A. Yes, sir.

Q. Isn't it his duty to take that from signals given by the brakemen?

A. It depends a good deal on the brakemen. If the engineer has no confidence in the brakemen he uses his own judgment.

Q. Supposing here is the track; you are backing right down here; you are backing with the engine right along, and you have
250 three box-cars back of you; it is a dark night; it is in the night; could the engineer see back through there to see when he should stop, or must he necessarily take that from the brakeman who would give him signals?

A. It depends a good deal on circumstances. If he has a good, competent man and he thinks he has plenty of room on the side track he can go any speed.

Q. Could a good, competent man see through those box-cars to see how far it is back to the cars back of him?

A. Yes, sir; he can by stepping outside.

Q. You swear he can do that in the night?

A. Any kind of a bright night.

Q. Well, in a dark night?

A. Not a very dark night; no.

Q. Isn't the custom and rule to take that from the brakeman who is on top looking for the cars?

A. There is cases of that.

Q. Isn't that the rule.

A. That's not the rule generally.

Q. You swear to that?

A. Well, I wouldn't swear to it.

Q. You say he must use his own judgment about how fast he will run the engine and how fast he will stop?

A. Yes, sir.

Q. Supposing he took a notion to stop just as quickly as he could by not only reversing it, but reversing it over so as to reverse the wheels from running backward to forward so as to jerk a man off the top of the car?

A. It depends on circumstances.

Q. Under some circumstances he would have a right to jerk a man off his feet from the top of the car like you and I used to crack the whip and send one by flying away off. Wouldn't it always be dangerous to throw a man off flying from the top of a car?

251 A. It depends on circumstances.

Q. You would do that if you were backing down on a track when you were not within ten car-lengths of any cars and there was no need to do it? You would crack a man off under these circumstances?

A. I don't understand what you mean by cracking a man off?
Q. Well, stopping so quickly you will send him off?
A. No man will do it with any common sense.
Q. No man of prudence would do it, would he?
A. No.

Redirect examination by W. P. CLOUGH:

Q. Is this the gentleman here who went to see you?
A. Yes, sir.
Q. Where were you when he called on you?
A. At my office.
Q. At your office in the round-house?
A. Yes, sir.
Q. When was that?
A. In the evening some time; I forget just what time.
Q. About how long ago was it?
A. Saturday, I guess.
Q. How long did the conversation between you and General Wilson last?
A. Not more than five minutes, I guess?
Q. What did he ask you?
A. He came in and drawed my attention, and I turned around and he asked how long this Bassett had left the service.
Q. Did he tell you what he wanted to know for?
A. No, sir; how long since Mr. Bassett had left the service of the company; I told him I could not state at the time, but I would look up the record. He asked me then what Mr. Bassett was discharged for. I told him I couldn't tell positively, as we had a record,
252 but I thought probably it was incompetency.
Q. That is, that that was the reason alleged for discharging him?
A. Yes, sir; as we had a good many cases at the time of this, I couldn't always remember.
Q. Did he wait for you to look up the record or refresh your memory at all?
A. No, sir; I told him if I got a chance and time I would look up the record and let him know positively.
Q. You may state if there were, as a matter of fact, a good many engineers discharged at that time.
A. There was a good many changes in the yard.
Q. How many engineers worked on this division during that year?
A. Probably about fifty.
Q. There are frequent changes in the corps of engineers, are there not?
A. Yes, sir.
Q. So it is impossible to remember at once the reason assigned for the discharge of any man within a year or two before?
A. Simply impossible.
Q. About how many are discharged each year, on an average?
A. Well, we have probably had from thirty to forty the last year, of changes.

Q. About thirty or forty changes every year?
A. Yes, sir.
Q. As I understand you to say, while you discharged Mr. Bassett, as a matter of fact, as master mechanic, it was not from any reason that emanated from you?
A. Yes, sir.
Q. What you meant to say was that the person who requested you to discharge him assigned that reason?
A. Yes, sir.
Q. Did you pretend to state to him any view of your own
253 as to his competency or incompetency?
A. No, sir.
Q. And he didn't ask you for it, did he?
A. No, sir.
Q. When you had seen the record you found it was not for that reason?
A. No, sir.
Q. That was all there was of it?
A. Yes, sir.
Q. He subpœnaed you here as a witness, didn't he?
A. Yes, sir.
Q. When you informed him what the facts were he didn't call you. When did you inform him what the facts were about this man's discharge?
A. I couldn't exactly tell; a day or two ago.
Q. Was it yesterday?
A. It was later than yesterday?
Q. Was it to-day? It was earlier than yesterday, was it?
A. Yes, sir.
Q. Was it since the trial of this suit was commenced?
A. No, sir.
Q. Since you were subpœnaed?
A. No, sir; not since I was subpœnaed.
Q. Did you inform General Wilson of the cause of the discharge before he subpœnaed you or after?
A. Before.
Q. Then he subpœnaed you after you had informed him?
A. Yes, sir.
Q. About how long was it after he had asked you at the shop before you informed him of the truth of the case?
A. Only this morning.
Q. It was then, was it, you told General Wilson you had
254 looked at the records and incompetency was not assigned there as a cause?
A. Yes, sir.
Q. Do you wish to retract any of your opinions as to Mr. Bassett's work as an engineer?
A. No, sir.
Q. You still adhere to them?
A. Yes, sir.
Q. Judge Wilson has interrogated you in regard to whipping a

man off the cars. You state that would be bad judgment, whipping a man off the cars like a whip-snapper?

A. Yes, sir.

Q. Have you ever seen any work of that kind?

A. No, sir; never seen it.

Q. That don't relate to stopping an engine to keep it under control, does it?

A. No, sir.

Q. It would be good judgment to stop an engine to keep her under control?

A. Yes, sir.

Q. Supposing, further, the case Mr. Bassett found himself in that night with men he didn't know—brakemen who had been at work in the yard only a day or two so far as he knew—was it his duty to check the engine and keep it under control or leave it all to the brakeman?

A. It was his duty to check the train, as any man would have done.

Q. Wouldn't it have been recklessness and misconduct if he had left the whole thing to Mr. Mares as to how far he should go and the speed?

A. Yes, sir.

Q. Not knowing Mr. Mares; having a slight acquaintance as he did?

A. Yes, sir.

255 Recross-examination by THOMAS WILSON:

Q. Was it his duty to check it slowly or rapidly?

A. You can't check an engine slowly.

Q. You swear to that positively?

A. You might just as well check the shot out of a gun.

Q. You swear to that positively?

A. Yes, sir.

Q. You must just shoot it off as fast as it can go?

A. When you reverse an engine it jerks the train every time, no matter how you handle it.

Redirect examination by W. P. CLOUGH:

Q. Is it possible to reverse an engine in any way without taking the slack out of all the cars?

A. No, sir.

Q. Did you ever see a case where it was done without that?

A. No, sir.

Recross-examination by THOMAS WILSON:

Q. A train of cars never stopped slowly or gradually, then, did it?

A. They do with a break on.

Q. They never do without a brake stop gradually or slowly? A train of cars never stops slowly or gradually unless they have a brake on, do they?

A. I don't know what the meaning of that is.

Q. Does a train of cars ever stop gradually or slowly that hasn't a brake on?

A. Certainly.

256 Redirect examination by W. P. CLOUGH:

Q. If it stops by the reversal of the engine, does it? He says does a train ever stop slowly unless the brake is on; you answer that it does. Now, I ask you if it can be stopped slowly or carefully, provided it is stopped by the reversal of the engine?

A. No, sir.

Q. It may be stopped without the reversal of the engine by letting it run far enough?

A. Why, certainly, if you don't care where you are going.

Q. If you are willing to let it run as far as it will?

A. Yes, sir.

Q. If it is necessary to stop short within a comparatively short space and you have to reverse the engine it always takes out all the slack of the cars?

A. Yes, sir.

Q. Are not freight cars always constructed differently in regard to stopping from passenger cars? Is there any difference between the effect of a sudden stop upon passenger cars and freight cars from the manner in which the two are constructed?

A. There is.

Q. What is the difference?

A. Simply the reason there is a brake used.

Q. Isn't there another difference in respect to the platform.

A. Oh, yes; have extending springs.

Q. Are there any of those in freight cars?

A. No, sir.

Q. Freight cars are connected together by links, are they not?

A. Yes, sir.

Q. With a space between the ends?

A. Yes, sir.

257 Q. Whenever there is a stop or start of freight cars they always come together, don't they?

A. Yes, sir.

LEVI GREER, called as a witness in behalf of the defendant, being first duly sworn, testifies as follows:

Direct examination by W. P. CLOUGH:

Q. Where do you live?

A. Fargo, Dakota Territory.

Q. What is your occupation?

A. At present, yardmaster for the Northern Pacific Railroad Company here in this city, the city of Fargo.

Q. How long have you been engaged in that employment?

A. About six months or a little over.

Q. How many years' experience have you had in railroading?

A. I have tried to have a little experience; varied sometimes; a little over 33 years.

Q. On what railroads in the country have you worked?

A. Illinois Central, Toledo, Wabash and Western, Chicago, Rock Island & Pacific, Kansas Pacific, Denver & Rio Grande, Denver & South Park, Denver, Longmont & Northwestern, and Northern Pacific.

Q. In what capacities have you worked on these several roads?

A. First, ringing bell when a boy on the left-hand side of the engine; then braking; from that to firing and running an engine; back to braking again; run a freight train; run a passenger train; superintendent; yardmaster; run a passenger train, and I don't know what.

Q. You have occupied numerous positions?

A. Also acted as master mechanic and had full charge of motive power for over a year.

Q. How many years' experience have you had as yardmaster?

A. A little over four and a half.

Q. On what roads?

258 A. Four years I was yardmaster and trainmaster for the Rock Island folks—Chicago, Rock Island & Pacific—and then six months for the Northern Pacific folks.

Q. Whereabouts on the Rock Island & Pacific?

A. I hadn't any home, sir.

Q. How many years were you brakeman altogether?

A. It's pretty hard to tell; I can't tell.

Q. Well, give us an idea.

A. Not to exceed two, I don't think.

Q. In handling cars in such a yard as this, in switching, state whether or not the movement of those cars is attended with more or less jars and jerks?

A. Why, certainly so, in switching; if you wish I should go on and explain about it?

Q. Certainly, I wish you to explain.

A. In the mode of switching nowadays the transportation becomes such a demand—such a rush—upon us that we cannot handle them with gloves on; in other words, we cannot handle them very carefully and move them just so; we have to go ahead a pretty good jog, reverse and go back the other way, and so on and so forth—first one side and then the other. If we would take it the way we did twenty-five years ago wouldn't get the yard clear in a week, the work we do now in a day.

Q. Are those facts true on all the leading roads in the country?

A. Yes, sir; all the roads I know of.

Q. Not confined to the Northern Pacific railroad?

A. No, sir.

Q. In order to handle the cars and make up trains it requires great promptness?

A. Yes, sir; on the part of everybody. The engineer handles the engine promptly, the man that throws the switch throws the switch promptly, and keeps his eyes wide open if he wants to get work from the company.

259 Q. It would be impossible to do the work in a slow manner?

A. It would be impossible to be done very slow—everybody be swearing; couldn't get over the road.

Q. Is there anything in switching in the yard that requires the brakeman to ride on the top of freight cars?

A. It ain't so considered that there are men required to stay on top of freight cars in the yard switching as they are on the road. Once in awhile, when there is a little going down of a little grade, I always tell the boys to ride the car down in so it won't hurt the cars below it.

Q. Now, in the movement of cars in the yards, is it necessary and is it customary to check them or handle them with the use of brakes?

A. No.

Q. How is that usually done?

A. Usually done by the parties handling the trains, the switchman and the fireman of the switch-engine or yardmaster, whoever is in charge, watching the movements of the train and the rapidity by which they are going, and stopping in time so you will think such a speed will run to such a place.

Q. What checks the motion of the cars; is it the setting of brakes or something else?

A. Why, the engine reversed—the reversal of the engine.

Q. Is it or is it not the common practice in yards generally in the country, including the Northern Pacific yard here, to check the motion of cars and stop them in the method spoken of—that is, reversal of the engine?

A. Always so.

Q. If a brakeman is riding on the top of cars that are being switched in the yard what has he a right to expect in regard to the movements of the cars?

A. If he is what I understand by a brakeman that's capable of switching in the yard—understands anything about it—recommends himself to a yardmaster, he has a right to look out for the
260 train to be jerked right out from under him most any time.

Q. That is your judgment of what he has a right to expect. What do you mean by having a right to expect the train will be jerked right out from under him any time?

A. I meant this: A man on top of a train—he is supposed to know, if he is what he claims to be, a practical railroad man and switchman—he is supposed to go on top of that car with the expectation of that engine to be tipped over any time with a full head of steam on.

Q. You don't mean he actually expects to have the car jerked from under him?

A. Nor I don't mean he will have lightning strike him.

Q. You didn't mean he had a right to expect to be jerked off?

A. No, sir; not if I did say so.

Q. Are brakemen ever required to be in that position of having the train jerked out from under them?

A. No, sir.

Q. Now, in the movement of cars, what has a brakeman got a right to expect on the top of freight cars or freight cars being moved in the yard by a switch-engine, in regard to the movements of the cars?

A. A brakeman, generally, getting on top of a train, he has a right to expect at any moment, and, as I said a moment ago, the sudden reversal of the engine, more especially a switch-engine in the yard. We claim to have that engine wide open most of the time to do the work quick and with rapidity—wide open and reversed—the steam not shut off, as you would on the road; just handle the lever with the steam wide open, usually working like sixty—steam up; the engineer gets a signal that will necessarily necessitate the train stopping right sudden; he has no right to get up there and stand like a great gawpey. Take brakemen who exercise care and look out, and they never get throwed down—never get thrown off their feet—never get throwed down.

Q. Has a brakeman a right to expect when he is on top of moving cars at any time that those cars won't be stopped suddenly?

261 A. He has a right to be on the lookout any second; you can't tell where or when.

Q. Is it not the duty of a careful brakeman to be always expecting, when he is on top of a car, a sudden arrest of the motion of the car?

A. It has always been my practice to charge my men——

Q. I am speaking about brakemen generally—in the practice everywhere—switching in the yard.

A. It is their own personal lookout, and it is a caution by me, I would say, and understood by practical railroad men, when they go switching around a train, they have to have a good hand-hold to get on top, and when they get on top to look out for a sudden jar—for anything that may come up suddenly.

Q. I will ask you if there is anything about the moving of cars in the yard that requires that? Is it possible to arrange beforehand in moving cars in the yard just when the cars being moved by the switch-engine will be checked up?

A. No, sir.

Q. It's impossible to make any such arrangement?

A. It is impossible to have any idea ahead, unless you tell the engineer to go down there very slow, get ready and stop; then you can know what you are going to do.

Q. Supposing the orders given to an engineer is to simply move cars a certain distance?

A. Then the brakemen in charge or around that engine are supposed to look out for that engineer to tip it right over suddenly, or go ahead suddenly a great deal faster than he was—just as fast as that engine will run.

Q. State about how many men work generally in a gang in the yard together.

A. Some roads have more, some less. When I came here last winter and took the yard they had four men with the engine—one

foreman and three helpers. I reduced it, and gave them two
262 helpers and a foreman.

Q. Are there always more or less men engaged in moving cars at the same time?

A. Some roads where there is not so much work they have only two men, a helper and foreman. I have hardly ever seen a force of men, with one engine in a yard switching—Toledo, Chicago, Cincinnati, or anywhere—with over four, what is called a full crew.

Q. State if in the process of switching the engineer has not a right to expect a signal to stop or check at any time from any of those men.

A. Any moment; supposed to sit there looking, and when he gets a signal to stop he stops.

Q. Is there anything in the rules of the yard in switching that the engineer is only to receive the signal to stop from any one of the men?

A. He has a right to receive a signal to stop from any of those men working with him or anybody else who may come up in front of him; two crews switching in the yard—if the crew in the lower yard sees he is coming into anything he has a right to take a signal from them. He has a right to take a signal from anybody.

Q. Is it customary to do so?

A. It is.

Q. If one of the two brakemen in a crew switching went on top of a car and one somewhere else, and the yardmaster, under the usages of the yard, would the brakeman on top of the car have a right to expect that there wouldn't be any stop without a signal from him to the engineer to stop? The man on top, you say, is supposed to give the signal. I ask you if a man riding on top of a freight car, a brakeman, in switching, has any right to suppose the engineer wouldn't stop unless he himself gave the signal for him to stop?

A. He has no right to presume any such thing; knowing anything about switching, he ought to look any moment for the man at the switch, his foreman, the yardmaster, or partner with whom he is braking, not on top, or the men anywhere to give a signal to stop.

263 Q. Suppose a man in switching cars in the yard, a brakeman, should mount the top of a freight car while the car was in motion and being switched, and should not be prepared at all times for a sudden arrest of the motion of the cars, would or would not that be negligence on his part? Suppose, in switching in the yard, three cars are cut out and are being shifted by the engine, in order to bring out more properly, then, the facts that have been shown in this case, and one of the brakemen mounts up on one of the cars and stands up there; if that brakeman, while standing on the top of the car while the car was being switched and moved by the engine, should at any moment not be prepared for a sudden stop of the cars, would it be carelessness or not on his part to be in that unprepared state?

A. I should call it so. I should call it carelessness not to be prepared to be ready to be stopped any second.

Q. How would that be considered among the best railroad men?

A. If I was a sporting man I would gamble on it there is a case of carelessness.

Q. From your knowledge?

A. It is carelessness, from my knowledge.

Q. That comes from the fact he must expect the signal to be given at any time by some other party?

A. That's so.

Q. That's true, is it?

A. That is true in all cases I have seen in the yards.

Q. Suppose there are signals given to an engineer who has hold of three cars to move them, to back them six or seven car-lengths, by a brakeman; the engineer hitches onto the cars and the brakeman gives the signal to back six or seven car-lengths; who has the right to determine at what speed those cars shall be backed—the brakeman or engineer?

A. Well, that's a kind of knotty question to answer, just there?

Q. I am speaking about the practice in the yard; who con-
264 trols the speed of the engine; does the brakeman control it?

A. The brakeman had ought to control it. The engineer controls it to a certain extent; the brakeman gives him the signal——

Q. I am speaking about a general signal; for instance, to back a certain number of car-lengths without any indication of the speed he shall do it in.

A. The engineer has got it under his control then; if he don't get a signal before that he runs along a pretty good jog.

Q. Before what?

A. When he gives the signal; when the brakeman on top gives the signal, or on the ground, it don't make any difference which, to back up a certain given distance, about seven car-lengths, say, the engineer has control of the speed he shall use. He runs it as fast as he wants to. He will usually run a pretty good jog four or five cars, but he will easy his speed before he gets there. He has control of it there; is supposed to have; does have.

Q. Is it or is it not always the duty of the engineer handling cars at night in the yard to exercise his judgment as to the safety of the speed in which he moves his engine?

A. It is his duty, certainly.

Q. Can anything relieve him of that duty?

A. Nothing that I know of.

Q. If an engineer, in backing cars in the yard in the process of switching, is moving at any time too rapidly, state whether or not it is his duty to check the speed of his engine and bring it under control.

A. It is his duty, certainly.

Q. State, with a careful brakeman, conducting himself as brakemen ordinarily do, is there any danger in standing on the top of a car that is being switched in the yard, at a rate of speed, say, from five to six miles an hour, in the reversal of an engine with steam on.

A. You wish I should state if there is any danger to a careful man

on top of the train that understands his business, with the
265 engine run at the rate of six or seven miles an hour, tipped over with the steam on?

Q. Yes, sir.

A. I shouldn't think there would be a bit of danger, or running at fifteen miles an hour.

Q. In your experience as a railroad man have you ever known a brakeman, using customary care and skill, riding on top of a car, being thrown from it by reason of the reversal of the engine when moved at the speed you have mentioned?

A. Never in my life.

Cross-examination by THOMAS WILSON:

Q. Since the court adjourned here last night some of you went to work to make an experiment in the yard here on this, didn't you, to see how it would affect a man—how it would throw him—if you stopped, running at a certain rate of speed?

A. Do you wish I should answer that, sir?

Q. Yes, sir; that's the reason I ask you any question.

A. Yes; I believe that was the understanding, to take this identical engine and try what effect she would have handling so many cars.

Q. You did it last night after the court adjourned, and took from that—between that and dark—to experiment and see what effect it would have, did you?

A. I don't know what time your court adjourned, sir; but along about dark we tried it.

Q. Who was with you?

A. There was Mr. Clough, and, in fact, I don't know just how many.

Q. The master mechanic, who testified here yesterday, was he there?

A. Yes, sir; I don't know whether he testified or not. The master mechanic of our shops was.

Q. Who else was there?

A. Well, now, I can't tell just how many was there; there
266 was quite a good many.

Q. Go on and tell all that you remember.

A. There was the men belonging to the crew; was all the extra ones I know.

Q. Belonging to the crew in the yard?

A. That was switching on that engine.

Q. What engine did you use?

A. Engine number two, switch-engine, if I remember right.

(By counsel for defendant:) 128?

A. 129.

Q. You thought it was 52 until the counsel told you, did you?

A. I forgot myself. They were both in there together. I wasn't certain which it was.

Q. You are now certain, after the counsel speaks, that it was 129?

A. Yes, sir.

Q. You took 129 last night in the yard, got some men on top and you run her along with three cars, and you stopped to see if it would throw them off?

A. Yes, sir.

Q. These men knew you were trying to see if you could throw them off?

A. I beg pardon; I guess not.

Q. You were backing up and down there making experiments of this kind, weren't you?

A. Yes, sir.

Q. Now, do you think these men were so stupid they didn't know what you were doing?

A. No, sir.

Q. Do you think a man standing there and getting ready to see if you would shoot him off would be just as likely to fall as if it came unexpectedly and suddenly like that, do you?

A. I think these gentlemen didn't know what we was try-
267 ing to do.

Q. Do you know they didn't?

A. I don't think they knew.

Q. Weren't you just running back and forth experimenting in this manner in the yard?

A. Yes, sir; we was.

Q. You had these three men on top, and you think they were so stupid they didn't know what you were doing?

A. No, sir; I don't think no such thing. I ordered these men on top.

Q. How fast did you run last night?

A. Well, not having a speed-recorder on either of the cars, I couldn't tell you.

Q. Well, you are a pretty smart man; you and I won't differ about that; tell about how fast you think they were running.

A. Oh, they were running possibly ten or twelve miles an hour.

Q. Will you swear they were?

A. I should think they were.

Q. Will you swear they were running eight miles an hour?

A. I understand I am under oath. I have taken an oath. I claim I know what I am doing. I am 21 years old. I claim and think that engine was running last night—spells—12 or 13 or 14 miles an hour.

Q. Do you swear positively that it was running as fast as eight miles an hour?

A. Yes, sir; I will swear positively that there was times last evening that engine and three cars was running, if they could have followed it right along at the height of speed, 12 or 13 miles an hour.

Q. When you put on the reverse were they running at the rate of eight miles an hour, do you swear?

A. I don't know what point you are trying to get at.

Q. It don't make any difference to you; you are not here to de-
fend this case, but to tell the truth. I ask you if, when the
268 engine was reversed, they were running eight miles an hour?

A. I will expressly state—I realize that I am under oath—no matter who it hurts or rubs, that that engine, when I gave the signal myself to stop her, was running over twelve miles an hour, with a full head of steam on; at least I told the engineer to do so.

Q. Do you think an engine could be stopped quick enough in the yard to be dangerous?

A. Not to a railroad man that knows all about it.

Q. Not to a railroad man, an engine couldn't be stopped quick enough in the yard to be dangerous?

A. Yes, sir.

Q. That's your opinion?

A. That's my opinion.

Q. Did you ever see a case when an engine would jerk quick enough when men were in passenger cars to throw men over the seats in the cars?

A. Never in my life; never seen air-brakes stop so as to do it.

Q. You don't think that can be done?

A. I know it isn't done.

Q. Do you think it can be done?

A. In my judgment I don't think an engine can throw a man off from his seat unless he is half drunk.

Q. A good, careful passenger that hadn't taken a drop. Will you swear that has not been done frequently and engineers have been discharged for that act?

A. I never did in my life, or ever heard of it.

Q. Had you all three of these men on the last car?

A. Yes, sir.

Q. Well, then, according to your judgment, it wasn't dangerous for Mares to be on the top of that last car at all?

A. Who is this man Mares?

Q. The plaintiff in this suit, the brakeman who was hurt;
269 in your judgment it wasn't dangerous for him to be there at all?

A. No, sir; not necessarily so.

Q. It wasn't at all?

A. Oh, certainly, it's dangerous every time you go around a railroad. It's dangerous—those things—and railroad men understand it. That's what they hire out for.

Q. It's safe, ordinarily speaking, isn't it?

A. Yes, sir; there isn't one quarter the danger that there is come to take ten or fifteen cars, because there is more slack.

Q. It wouldn't jerk hard enough to throw a man that was not a land-lubber off; even if you take ten or fifteen it wouldn't do it, would it?

A. It would be more likely.

Q. It would be perfectly safe, wouldn't it?

A. No, not perfectly. Don't understand me it would be perfectly safe for a man that hadn't got his feet under him in good shape.

Q. Take a man well built—straight, compact man, about 22 or '3 years of age, active, sober, and industrious—you say there would be to that man no danger?

A. There hadn't ought to be.

Q. There wouldn't be a bit, would there?

A. A bit, you get that in there; there is danger to go anywhere near a train. It would be dangerous in that sense; it wouldn't be dangerous in the ordinary sense.

Q. It wouldn't be dangerous for a man knowing what he was doing hired by the company?

A. No, sir; not a bit.

Q. Wouldn't be any more dangerous than the ordinary every-day work of a brakeman?

A. No, sir.

Q. Then a man that did like this plaintiff wouldn't be guilty of any dangerous or reckless act?

270 A. He has got to look out.

Q. You wouldn't say, as a railroad man, that was a lack of ordinary care and prudence?

A. I would say, as a railroad man, any man around a train is supposed to use caution. Switching in the yard is more dangerous than on the train.

Q. For a man switching in the yard when they are backing down the track, when you don't strike anything, to stand on the top of the car and look along the track, that is not any more dangerous than all other duties of brakemen, is it?

A. Yes, sir, it is; because he is liable to be stopped—the engine tipped right over any instant.

Q. When you don't run against cars; when there is no necessity?

A. That's the question I tried to answer.

Q. That man is put on the car to see what is on the track, looking ahead?

A. Not necessarily so.

Q. He necessarily is often so, isn't he?

A. Not switching in the yard; you can see just what you are doing in the yard; without it is in the night he knows what is ahead of him.

Q. Where it is in the night it would be proper for him to be there with a lantern to see what was there?

A. It would be more proper to be down and run ahead to see what is ahead of him.

Q. Isn't it very frequently done, for a man to get on top of a car and look in the direction in which the car is moving?

A. No, sir; not customary.

Q. You swear to that before the jury?

A. I say it is not customary to go on top of a car to look, and by a light, ahead.

Q. Will you swear that in switching cars in the yard it is not customary for one of the brakemen to get on top of those cars?

271 A. They very often get on top to ride a car in.

Q. Will you swear to this jury that it is not customary and proper for a man braking in the yard to get on top of cars that are being switched onto a track from another track?

A. Sometimes to pull the pin and ride the car in—to ride the

train in; it's easier for them to ride in than to walk; quite a little distance; it's customary.

Q. In fact, you see it every day in yards, don't you?

A. Oh, yes, sir.

Q. Very well; that that's done every day is customary, isn't it?

A. Yes, sir; the custom, I presume.

Q. That is customary here; did you ever know a yard—you seem to know as much as any man I ever knew about railroads, you have been on as many—did you ever know a railroad yard that it was not customary for brakemen under such circumstances to get on top of the cars?

A. Under which circumstances?

Q. I have stated to you the circumstances; changing cars from one track, backing them down onto another with the switch-engine.

A. Well, in certain circumstances they sometimes do it.

Q. Did you ever know a yard in the world in which it wasn't customary to do that thing?

A. It is certainly customary to get on the train and pull the pins.

Q. That is as safe as any work, running a passenger train or any other?

A. In the yard?

Q. Isn't it as safe as any other work they do in the yard?

A. Yes, sir; undoubtedly it is if he sits down.

Q. Now, a man like you, that does everything you have illustrated to the jury this way, do you have men sitting down when you are jerking things around quick that way?

A. He hadn't ought to.

272 Q. Then it was his duty to stand up?

A. Yes, sir; and to look out for being thrown off.

Q. Then when Mares stood up here he was really at his duty, wasn't he?

A. I suppose he was if he was working for the company.

Q. Now, when you are backing down on a track that way in the night, in the dark, and you have three cars attached and the signal given, the engineer couldn't know what was back of him, could he?

A. No, sir.

Q. The man that was on the back car at the rear of the train and had a lantern would be the man that would know about it, if any one?

A. He knows as far as he can see, but in the night a man running on the ground—he would know more what was ahead of him.

Q. The man that was on the car with his lantern could see quite a distance, couldn't he?

A. It's owing to whether the electric light is shining in good shape or a full moon.

Q. Where there was no electric light a man with a lantern on the car could see down the track a considerable distance?

A. Around a sharp curve, both tracks on each side of him full of cars, he couldn't see *be* but a little way.

Q. Where the track wasn't full of cars, couldn't he see down the track quite a little piece? Now, Mr. Witness, you stated if a man

stood properly on the cars—took the proper precautions and stood like an intelligent brakeman should—there would be no danger of his being thrown off under such circumstances. Just illustrate.

A. Gentlemen of the Jury: When he goes on top and all the while going up has got a good hold, a firm hold, with the supposition, although he don't see any occasion around that engine, and he is the only one, he thinks, with any power to give that signal——

Q. I want you to state to me how you would have him stand on top of the car to be perfectly safe.

273 A. When he gets on top he stands in a brace, which would brace sideways or anyways, whatever position you happen to get in.

Q. Now, supposing he braced sideways in this way and the car was stopped real quick; how quick would he go off, do you think?

A. He wouldn't go off at all; if he had any bracing at all he wouldn't.

Q. You are sure he wouldn't; you are sure of that, ain't you—he wouldn't go off at all? If he braced himself, now, for instance, he would have a right to expect him to increase the speed——

A. But in my statement you didn't let me finish——

Q. I am speaking to you of your direct examination. Now, he would have right to expect anything most?

A. Yes, sir; that's exactly what he would have a right to—a sudden stop or to go ahead fast.

Q. Very well, if he braces himself for a sudden stop he braces himself one way, doesn't he?

A. It don't make any difference which way; if he is braced he is braced for everything, the same position. If I stand here on top of a train I can ride here and you can jerk them just as fast as you want to.

Q. You could jerk the engine, then, just as fast as you wanted to and you could stand there.

A. Yes, sir.

Q. Now, do you think there is another man in the world that could do that?

A. Yes; lots of them.

Q. Then no man who is a practical railroad man ever fell off a car, did he?

A. Oh, the best of them fall off. Good swimmers drown.

Q. How would he come to fall off—a practical railroad man; you couldn't throw him off; how would it be?

A. It's hard telling. Good swimmers drown, you know.

Q. State whether you ever knew a car stopped so suddenly

274 in the yard as to be dangerous.

A. Why, every stop they make is dangerous—every stop they make in the world is dangerous—danger of draw-heads pulling out; danger of mashing in the draw-heads.

Q. To a man that stood properly on top did you ever know a train stopped so suddenly that it was dangerous?

A. No, sir; I didn't; no need to.

Q. Well, you say there is no need to. Does a switch-engine in

the yard act more promptly than an engine that's usually used on the road?

A. A good deal so; ten to one so.

Q. Hence the quickness with which a train sometimes jerks on the railroad isn't a tenth as much as this switch-engine could jerk in the yard?

A. Now, you want I should answer that question so it will be understood by the jury?

Q. Yes, sir.

A. Any engine that's doing the same kind of work, that's got the same amount of power, can do the same amount of mischief——

Q. Didn't you state to me a minute ago that a switch-engine would jerk ten times as fast as a road-engine?

A. Yes, sir.

Q. If a switch-engine can jerk by turning it over suddenly ten times as fast as an engine running on the road——

A. She can't do any more than an engine of the same size and valves with the same amount of steam, but they do do it.

Q. Then if a switch-engine jerks ten times as fast it would jerk a train ten times as hard as an ordinary road-engine, wouldn't it?

A. Yes, sir; as ordinary road-engines do, not as they can. We have got little engines here that haven't anywhere near the power road-engines have.

Q. How was it with 52?

A. She hasn't got the power road-engines have.

275 Q. Hasn't she quicker valve action, and if she has quicker valve action isn't that what makes the suddenness of the jerk?

A. It is in reversing with a full head of steam makes the jerk.

Q. If an engine has a quick valve action isn't that the thing that enables her to make the quickness of the jerk?

A. They build these ponies the same as you want a Morgan horse, not to haul a big load; they build them with quick motion and strong.

Q. If she has quick valve action doesn't — enable her to make a quicker jerk?

A. It does, but she hasn't got quicker valve action than a great many of our other engines have.

Q. Didn't you state to me a minute ago these yard-engines have quicker valve action than the road-engines?

A. Some of them do.

Q. Isn't that the rule?

A. Switch-engines are built for the yard with the same style of valve and all that, only they are ponies—built on the pony principle—to turn over and not hurt them.

Q. Didn't you state to me that a yard-engine has a quicker action than a road-engine?

A. Some of them.

Q. How is it with 52?

A. Very good valve action.

Q. Quick valve action?

A. Yes, sir; not any faster than some of the road-engines have. The heft of the engine is on the drive-wheels, while the road-engine is eased up on the trucks. It is true they reverse a good deal quicker motion than they do on the road. You cut me off before I got a chance to straighten it out.

Q. When they have a quick valve action isn't that a matter that enables them to make a quick and sudden jerk?

A. Certainly; the quicker the valve action the quicker the jerk.

276 Q. Didn't you state to me a minute ago that yard-engines had quicker valve action than road-engines?

A. I say so. I say yet some of them have, some not.

Q. Didn't you state that was the rule?

A. No, sir; not always; some roads turn right in road-engines for switch-engines.

Q. Now, last night when you were making this trial how many pounds of steam had you on?

A. I didn't look, sir; the engineer can be got here mighty quick.

Q. The quickness with which an engine will stop or jerk will depend a good deal on the number of pounds of steam on?

A. Well, when you get an engine up to about 110 pounds she will handle three or four cars about as quick as with 160.

Q. Won't the quickness with which you will stop a train depend a great deal upon the number of pounds of steam you have on?

A. On where?

Q. On the engine.

A. Not necessarily, if you don't give it to her.

Q. No, but when, as you have stated, it is thrown open so as to give her all the steam you can?

A. She would slip; wouldn't go at all; stand still and the wheels go around.

Q. Then, according to your statement, the number of pounds of steam an engine carries would not affect the rapidity with which she would stop?

A. If you give it to her right it is liable to.

Q. Wouldn't the quickness with which you will stop depend a good deal on the number of pounds of steam you have on?

A. It depends on how it's used. I will take 110 pounds and handle a train more rapidly than you can with 160 and slap her right on; the engine won't hold down.

Q. The number of pounds of steam you have on an engine

277 gives the force to that engine?

A. If you apply it right to her, give it to her.

Q. When you do apply it to her the greater the force is the quicker you can stop her, and the quicker you can make the jerk?

A. Certainly; that's common sense; in a minute.

Q. Then you say you don't know the number of pounds of steam you had on last night?

A. No, sir; I didn't look at the gauge. He ought to know what he is carrying.

Q. I understood you, Mr. Witness, in your direct examination to

say that the brakeman ought to regulate the rate of speed in switching; did you say so?

A. They very frequently do.

Q. Didn't you state that they ought to; didn't you state that the brakeman ought to regulate the rate of speed in switching?

A. Well, they very frequently do.

Q. Didn't you state in your direct examination to Mr. Clough that the brakeman ought to do so?

A. The brakeman, or fireman, or yardmaster, or engineer, the men at work with the engine, have perfect control of that engine; he watches their motions; if he is running too fast, afraid of running into anything, they give him a signal; he regulates the steam; shuts it off and puts it on as he wants to.

Q. He puts it on or shuts it off in accordance with their signals?

A. He ought to.

Q. The engineer puts on steam and regulates the speed according to the signals given to him by the brakeman?

A. He ought to.

Q. If he don't do that he don't do his duty, does he?

A. No, sir; he ain't tending to his duty if he don't watch the signals and obey the signals as soon as he can.

278 Q. You say if they want him to go slow they make a motion to have him go slow; if they want him to go fast they make a motion to him to go fast, and when they want him to stop they signal to him to stop?

A. Yes, sir.

Q. All persons in the yard would understand that was so?

A. They always understand that; yes, sir; the engineer don't oftentimes get the signals, and the fireman gets them and gives them to him.

Q. Sometimes the brakeman stands in front and gives them to him?

A. Yes, sir.

Q. Sometimes stands on the back part of the switch-engine to repeat the signals?

A. Yes, sir.

Q. But wherever it is done the brakeman gives the signal and the engineer, in pursuance of the signal, regulates the speed of the engine?

A. Not always.

Q. That is his duty, you say?

A. Not always; sometimes the conductors have to give the signal; don't have anybody to pass it, but ordinarily it is the brakeman; in switching in the yard it is sometimes one and sometimes another.

Q. The crew that is with the engine has control of that engine and regulates the speed as they want it to run; the one that gives the signal gives it and he obeys the signal?

A. If he don't see somebody else reverse that signal quick.

Q. You say he always does it?

A. I say if he don't get a signal from some other source to stop it—change it.

Q. But where he gets no signal from any other source it would be his duty to obey that signal?

A. Without he finds something wrong on his engine and tips her over to save himself.

Q. If he was making a collision or running over a man, then he would take any hazards to avoid the danger?

279 A. Yes, sir.

Q. Where there are none of those, then he obeys the signal given?

A. He obeys generally the signal given.

Q. He follows the back-up signal until somebody says stop, and he follows the stop signal until he is signalled to go ahead. From that you would understand that he is under the men in the yard?

A. Yes, sir.

Q. Say this is the engine. Here is the engine here and him on one side or the other looking out on the side?

A. Yes, sir.

Q. And the fireman on one side so that he can look out, can look ahead or back or along the side, so that he can see signals wherever they are given, and whenever he gets a signal he gives it to the engineer?

A. Yes, sir.

Q. On each side?

A. Yes, sir.

Q. If they are moving backward always looking backward?

A. Yes, sir.

Q. Always looking in the direction they are going?

A. That is his duty; yes, sir.

Q. To the person that would be back here giving the signals, one on one side and one on the other, would be looking to that person for a signal what to do?

A. Ought to.

Q. If he didn't do that he would be violating his plain duty?

A. Without sometimes his pump or indicator bothers him.

Q. If the pump or indicator bothered him it wouldn't be his duty to do that; but where there is nothing the matter with the pump or indicator it would be his duty to obey those signals, wouldn't it?

A. By all means to obey the signals.

280 Redirect examination by W. P. CLOUGH:

Q. You say the engineer should be governed in the speed of his engine by signals. Now, suppose an engineer was backing up with three cars in the night in the yard on a track where he didn't know what was in front of him, and the signal given was either to back or say to back six or seven cars, would that require him to go fast or slow or at any particular speed?

A. Not necessarily so.

(The plaintiff objects to this question upon the ground that this

has all been gone over, which objection is sustained, to which ruling defendant excepts.)

Q. If an engineer were backing three cars, say, with any head of steam on which he is capable of carrying, and a brakeman were standing on the rear of the car—one of those cars of the rear car—and was using usual care and diligence that is customary for brakemen to use under such circumstances, could the reversal of the engine with any head of steam be dangerous to that man?

A. I wouldn't think so; no.

Q. Now, the learned counsel has asked you about some experiments that were tried last night; will you please state what was done and who were present?

A. There was myself, Mr. Clough here, and Mr. Rupert and Isaac Teede, foreman of the engine——

Q. Who is he, do you say?

A. The foreman of the engine that we worked last night, Harry Smith or Harvey Smith, and the other young man's name I have forgotten.

Q. What is Smith?

A. Braking on that engine, and the other man is braking on that engine; Mr. Galvin, who used to be conductor on the road, he stood by; in fact two or three others; I can't tell their names; I know their faces if I see them; this Teede and both brakemen was
281 there and on top of the train.

Q. What did you do? Just explain what was done.

A. I told this man Teede, the foreman of the engine, and his two men to get up on top of the train; I didn't say what I was going to do—where I was going to go.

Q. As far as you know, had they the slightest intimation of what was going to be done?

A. Not the slightest in the world; any more than I have that somebody is going to shoot me.

Q. They got up, as you have stated, on one of the cars?

A. I told the engineer to go up and run down by the crossing—we was working down by the freight-house—and to come back about as fast as he could. I says, "Just about as quick as you come opposite of where we are I will give you a signal to stop with a full head of steam on." He done it.

Q. Did you see anything dangerous?

A. I didn't see the boys move any. I didn't see them shake around any. I didn't see but what they had their feet under them in good shape. I told him to run ahead and stop her the other way. I told him to come back and stop her without any steam on; also to come back and reverse her both ways. He came back running about ten or twelve miles an hour. He reversed her and stopped her and then tipped her over the other way.

Q. What do you mean by tipping her over?

A. That's a common phrase for reversing an engine.

Q. How many times was that tried?

A. I couldn't say exactly; four or five. I didn't keep track of the times.

Q. What rate of speed was used?

A. In my honest opinion, he was running along ten or twelve or thirteen miles an hour. I didn't tell the boys what I wanted. They didn't know what I wanted to do with the cars.

282 Q. In such a case as that is there any difference in a train of three cars or ten or fifteen?

A. A great deal.

Q. What is the reason for that difference?

A. There is so much slack in the links and pins. The more cars you have the more slack you have in the train. Take a train of forty or fifty cars and you have almost a half a car-length of slack.

Q. Where did you stand—were you on the ground?

A. I was on the ground pretty well west—back from the switch.

Q. State if you know the engine 52 and the engine actually used last night in the experiment?

A. Engine 129 was used last night; I calculated to use 52.

Q. Is there any difference between 129 and 52?

A. Mr. Rupert is here; he can tell.

Q. Would there be any difference in the effect of such an experiment between 52 and 129?

A. I shouldn't think there would be a shade; I shouldn't think there would be a bit.

Q. In trying that experiment, when the engine was reversed with steam on near us, coming just about opposite from where you stood on the ground, was there any jar that appeared to have any particular effect upon the men standing on the car?

A. Not as I could see. I stood close by them, almost as near as those gentlemen and you—as far as from here to the stove, possibly.

Q. When there was a double reverse of the engine with steam on what effect did that have?

A. It made the men rather nerve themselves in that position—that way.

Q. Which way did they go, then—backwards or forwards?

A. Towards the middle of the car.

Q. The effect, then, of the double reverse wasn't to throw tehm forward, but backward?

283 A. Yes, sir.

Q. And the effect of the single reverse with a full head of steam was apparently nothing that could be noticed from the ground?

A. Apparently not on the men.

Recross-examination by THOMAS WILSON:

Q. The double reverse threw them back towards the center of the car and the single reverse didn't move them a bit?

A. I didn't say it throwed them back; I beg your pardon.

Q. Then the effect of the double reverse was to throw them backward?

A. It would be if they had fell.

Q. You say it was, then, last night. Didn't you so answer your counsel?

A. I didn't say they were throwed at all.

Q. Didn't you answer your counsel that when there was a double reverse it threw them backward toward the middle of the car?

A. The tendency would be that way.

Q. Didn't you say it did?

A. Not that I know of—that I said so. I didn't say it throwed them at all. I said the tendency was that way. My answer to the gentleman's question was the tendency was to make them nerve themselves. If they had fell at all it would be towards the middle of the car, not towards the end.

Q. Who gave the signal to stop that car, to make the reverse either way or both ways?

A. I did.

Q. Where did you stand?

A. I stood right—possibly ten feet from the side of the track.

Q. How near to where the train was at the time?

A. The train was coming towards me.

Q. How far was it from you?

284 A. The train was coming towards me going west; the engine was on that end of it; the three cars was coming towards me; the first car where the men stood was, of course, next to me.

Q. How did you give the signal to the engineer—this way?

A. Well, I come this on it.

Q. That's the right signal to use?

A. That's one of the signals.

Q. Yardmen would understand that was to stop?

A. Yes, sir; they would.

Q. How far were you in front of the train when you did that?

A. Well, I was not—the train was almost directly across. I wanted to stop it opposite of me; was almost directly opposite from me.

Q. How far were the men on top of that car from you when you gave that signal?

A. A little to the west; about opposite to me.

Q. Looking right at you?

A. I don't know; I didn't watch them to see.

Q. Then they didn't know that engine was going to stop then at all. That's all, sir.

HARVEY SMITH, called as a witness in behalf of the defendant, being first duly sworn, testifies as follows:

Direct examination by W. P. CLOUGH:

Q. Where are you living now?

A. Fargo.

Q. You are employed in the yard of this company?

A. Yes, sir.

Q. Are you the foreman of the gang here?

A. No, sir.
Q. You are a brakeman?
A. A helper; yes, sir.
Q. How long have you been at work in this yard braking?
285 A. Seven nights.
Q. You have had previous experience in braking in yards?
A. Yes, sir.
Q. Whereabouts?
A. I switched for the St. Louis Bridge Company and in the south-eastern yard in East St. Louis.
Q. About what period of time?
A. Have I been railroading?
Q. Yes, sir.
A. Since the winter of 1872 and '3.
Q. About ten years?
A. Yes, sir.
Q. You are accustomed, then, to the way business is done in some of the principal yards in the country?
A. Yes, sir.
Q. Those yards are important yards that you speak of?
A. The Bridge Company's yard is the most important, I think; more or less important. I have worked in the most important I have seen.
Q. A great many roads come into that?
A. Yes, sir.
Q. State if you are acquainted with the customs and methods of switching and handling cars in railroad yards.
A. I am.
Q. What is the practice in handling cars in yards; is it customary to handle them swiftly and promptly, or otherwise?
A. Swiftly.
Q. State if that is necessary.
A. Yes, sir.
Q. In respect, now, to the duties of brakemen riding on the top of cars in yards to look out and be prepared for the checking of the speed of trains, and so forth, what are the duties of brake-
286 men in that particular?
A. Well, whenever a man gets on top of a car in the yard he looks for something of the kind; he ought to; he can expect it whether he gets it or not. It is very seldom a switchman gets on top of a train to do any riding unless they are moving from one yard to another. He has hold of the side and never gets on top. Well, yes, he gets on top; I will take that back. It's very seldom he ever does so; it ain't expected of him.
Q. The general practice being to move along the side of the car or in front of it?
A. Yes, sir; catch onto the side ladder, step onto the brake-beam, catch on the brake-staff, step on the brake-beam, and hold onto the brake-staff.
Q. What is the brake-beam?

A. It's a beam of wood that goes across in front of the wheels, that acts as a binder on the wheels when you put up the brakes.

Q. Sometimes they stand on that, you say?

A. Yes, sir.

Q. Then, as I understand you, getting on top of a car to ride is not a usual thing?

A. Not for switchmen; no, sir.

Q. How is that with the other men handling cars in the gang switching in the yard; is the rule any different?

A. Well, in other yards—in the Bridge Company's yard in St. Louis—I don't think I ever was on top of a car while I was there.

Q. I am speaking about brakemen in the crew.

A. On the road or on a freight train?

Q. No; in the yard. A man who is braking, switching, doing anything in the yard such as brakemen usually do; what is their custom?

A. I was only on one car last night, I think, in doing the work.

Q. I am speaking generally.

A. Well, generally his duty is on the ground, giving signals,
287 pulling pins, and cutting cars.

Q. Now, supposing he does get up on a car and stand, has he any right to suppose at any time that the engine may not be suddenly stopped or started or the speed suddenly increased?

A. Well, he ought to expect it.

Q. Has he any right not to expect it?

A. No.

Q. State what his duty is in respect to being prepared for sudden checking or stopping of the speed at any time.

A. Well, the way with myself, I am on the lookout for it.

Q. Well, how is it among railroad men generally?

A. Well, I can answer that by saying that among railroad men generally they don't ride on top of cars.

Q. But if they do get up there what do they expect; what are they looking out for?

A. Well, really, I don't hardly know how to answer that question.

Q. What I want to arrive at is this: Has a man a right—a brakeman in switching in the yard or any member of the crew a right—to get up and stand on top of a moving car without being prepared at all times for a sudden stop or start from stopping or slow speed?

A. Well, when he sees they are going to do anything he will prepare himself.

Q. Supposing he doesn't see, has he a right to get up there and stand on the top of the car without being prepared at all times for a sudden stopping or starting of the engine?

A. Take a railroad man standing on top of a car, he always stands in a position all ready to prepare himself; stands that way, always prepared, on top of a car, with one foot before the other.

Q. You understand that to be your duty, do you?

A. That's a practice of railroad men standing on a train; yes, sir.

Q. Can they tell when the speed of a car may be suddenly checked

or suddenly increased; isn't it liable to be at all times or at any time?

288 A. Yes, sir; it's liable to be at any time.

Q. Isn't that something every man has a right to expect on top of a moving car in the yard?

A. To get shook up; yes, sir.

Q. Suppose a man should get up on a car being moved in the yard by a switch-engine without being prepared for anything of that kind, would that be good usage and diligence, or would it be the contrary—would it be negligence?

A. Well, it would be carelessness on his part, I think. I know a man is always counted careless if he gets jerked off the train wherever I have switched.

Q. It is always regarded as being occasioned by a want of care?

A. Yes, sir.

Q. State if there is anything unusual in cars being stopped in switching in the yard by reversing the engine with a full head of steam on.

A. Well, yes; it's unusual to stop them with a full head of steam, to reverse the engine; they will shut off and pull the engine over or reverse it after it is shut off. It is very seldom they reverse with a full head of steam on.

Q. They do it sometimes?

A. Yes, sir; they do sometimes.

Q. Is it at all infrequent that that should be done in the yard?

A. In giving my experience I am giving my experience from what I have had in the yard here. I have worked in the St. Louis Bridge Company's yard there, where it was a very common practice to pull the engine over with a full head of steam. They had air-brakes on the engine; they used brakes to switch; whenever their brakes didn't stop them they gave her a full head of steam to stop them.

Q. Is it or is it not something which it is the duty of every brakeman riding on top of cars in the yard to be prepared for at all times?

A. I think it is.

289 Q. Is that your understanding of it?

A. My understanding is, whenever I am on top of a train, to look out for a stop.

Q. I will ask you if, in your railroad experience, you have ever known of a man being thrown from the top of a moving car that was going not to exceed six or seven miles an hour from the reversal of the engine, either with a full head of steam or without, unless he went off from his own carelessness?

A. No; I have been thrown flat on top of a car myself in a case of that kind.

Q. That is, where it stopped suddenly?

A. Yes, sir. I never saw anybody pitched off going six or seven or eight miles an hour.

Q. Did you ever know of anybody being thrown down?

A. Yes, sir; I have been thrown down myself.

Q. How was that stopped—by a collision?

A. No, sir; by a very sudden stop; pulling a very heavy road-engine over—from forty to fifty cars. They was signaled down in coming into the yard in St. Louis. The engine was reversed, the slack run up, and it pitched me flat on top of the car.

Q. How far was you from the engine?

A. I was braking in the middle—probably twenty cars.

Q. Would there be any difference upon the twentieth car from the engine and the third car?

A. Yes, sir.

Q. How much greater would be the proportion on the twentieth car than on the third?

A. Really, I don't know. The slack of twenty cars running up, and we had twenty-five behind, would throw them against the head end; the head end being solid would shake you up pretty well.

Q. Be many times greater than if you were only on the third car?

A. Yes, sir.

290 Q. If there were only three on?

A. Yes, sir.

Q. Suppose this state of circumstances should exist: In the night time three cars are being moved by the switch-engine—backed up by a switch-engine—and a brakeman gets on top of the third car away from the engine—those are being moved at the rate of six miles an hour; state whether that brakeman when he got on that car was under obligation to prepare himself for any sudden stop or check of the speed of the car that might occur, according to the usages of railroad men generally.

A. Well, I would be.

Q. Well, how is it with railroad men generally?

A. Well, under certain circumstances, if they are only going to move four or five car-lengths, they wouldn't get on top.

Q. Has a man a right to get up and stand in such a position as that without being prepared?

A. No, sir; I think not.

Q. If a man were prepared as he ought to be, tending to his business—a careful man—on top of a car of that kind, the cars being moved six miles an hour, could he be thrown off by any reversal of the engine?

A. He could if he were standing right on the edge of the car.

Q. I say if he was standing as he ought to?

A. No, sir.

Q. In a case of that kind would it be care or negligence for a man to take his station right on the rear end of the car the way it was going without any support?

A. Well, I don't know; I wouldn't take such a position as that; I would get into the middle of the car.

Q. Would there be any reason why a man would have to go to the front end of the car and stand there so near the end that the shock would throw him off?

A. No; no occasion for him to do it.

Q. If a man is standing on a car is there anything in re-
291 gard to seeing the track ahead of him that would require him to go up that close?

A. No, sir; a man can stand in the middle of a car and see all ahead of him that he wants to.

Q. All that would be necessary?

A. Yes, sir.

Q. If he walked up near the edge of the car that would be unnecessary?

A. Well, not necessarily, because he will have to go near the end of the car to get down if he is going to back into a string of cars to couple them up; he's got to get near the end of the car to go down the ladder.

Q. When he is riding along in the night that way is there anything that compels him to go to the front end of the car?

A. Nothing but to go down the ladder.

Q. I am speaking about the time the cars are in motion.

A. Well, a man has got to be on the ground, you know, to make the couplings; you are off three or four car-lengths from this string of cars; he will go to the end, take hold of the ladder, get down, and give them the signal to back up. In that case, just as soon as they have a motion to go ahead there, unless he stops the train, it is his time to look around for the pin making the coupling.

Q. Suppose a man stands so near the front ladder, is it necessary for him to stand so near the end for that purpose that he will be jerked off by any stopping of the car?

A. It's not necessary; no, sir.

Q. If a man takes his station in such a position as that, such a way, is it his duty to be prepared for a sudden shock or not?

A. Well, if he thinks anything of his body, it is.

Cross-examination by THOMAS WILSON:

Q. Were you careful or careless at that time you were thrown down in that St. Louis yard and fell on top of the car?

A. Well, I wasn't expecting it. I don't know whether I
292 was careful or not. I wasn't expecting it.

Q. Well, you stated in one of your answers if a man was expecting to strike anything, then it was his duty to prepare himself. The counsel asked you about this matter, and you say if he sees anything that he is going to hit, then he will prepare himself?

A. Yes, sir.

Q. Then in this case that you were thrown down you didn't see anything you were going to hit and didn't prepare yourself?

A. No, sir.

Q. Very well, then, any other man that didn't see anything he was going to hit might be in the same position and not be prepared?

A. Yes, sir.

Q. That wasn't carelessness in you, was it, when you didn't see anything you was going to hit; the cars going six or seven miles an hour stopped suddenly and threw you flat down; you were not careless there, were you?

A. I can't say that I was in a case of that kind; for instance, a man going along walking over the train, walking over to the head end, he may be in the act of stepping near one end of the car when the shock comes.

Q. Was that the case with you?

A. I can't say whether it was or not.

Q. Didn't you swear a minute ago you were in the middle of the car?

A. Yes, sir.

Q. Now, you say you don't know whether you was stepping from one car to the other?

A. I said just in the act of walking from one car to the other.

Q. Very well, isn't it common for brakemen under those circumstances to walk from one end of a car to the other?

A. Yes, sir.

Q. Very common?

293 A. Yes, sir.

Q. That's not carelessness, is it?

A. No, sir.

Q. It's done every day, ain't it? Now, then, you having seen nothing that time you were going to strike, going six or seven miles an hour—now, I will ask you the question, if that knocked you flat down, how far might you have staggered and stumbled before falling; how far would a man ordinarily stagger and stumble before he would fall flat down?

A. I probably pitched my length.

Q. Well, might not a man, and a careful man, stumble double his length before he fell flat down with such a jerk?

A. He might possibly; it's just the motion he is in; if he is in the act of stepping, if a man has been fixed for it, if I had been fixed for it, knowing what was coming that day——

Q. If you had seen anything you was going to strike you would have been better prepared?

A. Yes, sir; it was something unusual, coming into the yard to be swung up there.

Q. This was coming into the yard?

A. Yes, sir; coming over the Missouri Pacific.

Q. Probably running six or eight miles an hour?

A. Not under six.

Q. You have been railroading eight or ten years, about?

A. Ten years, about.

Q. What are you doing here?

A. Switching.

Q. How long have you been?

A. A week ago last night.

Q. Then when you answer the counsel it is unusual to stop with a full head of steam on and reverse the engine—reverse it with a full head of steam on—you did state to him so?

A. I did state to him so.

294 Q. Is that true, it is unusual to do so?

A. I have not seen it done but very few times in this yard.

Q. Did you ever see it done in this yard?
A. I have; yes, sir.
Q. When?
A. Last night. I will take that back.
Q. How long have you been railroading different places? Tell me the different roads.
A. I have been on the Missouri Pacific.
Q. How long?
A. Well, I suppose I was on the Missouri Pacific three months.
Q. Where else?
A. On the Iron Mountain road.
Q. About how long?
A. Well, I was there three or four different times; probably five years altogether.
Q. Off and on?
A. Yes, sir; I would go off onto another road and come back.
Q. Where else?
A. I was on the Kansas Pacific eight months at one time. I have been in the Kansas Pacific yard at Armstrong about two months.
Q. Where else?
A. I was on the Louisville & Nashville road about two years and a half.
Q. Continuously, or at different times?
A. Different times. I was there three different times.
Q. Where else?
A. In the southeastern yard in East St. Louis for about three months.
Q. Off and on?
A. Well, at one time.
Q. Where else?
295 A. I was in the Bridge Company's yard two weeks—St. Louis.
Q. Where else?
A. Well, I believe that is all, until I came here a week ago last Sunday.
Q. That all, sir? You attended church that day, no doubt?
A. If I did I didn't know it.

JOHN RYAN, called as a witness in behalf of the defendant, being first duly sworn, testifies as follows:

Direct examination by W. P. CLOUGH:

Q. Where do you live, John?
A. In Fargo.
Q. How old are you?
A. Twenty-one.
Q. What is your business?
A. Fireman.
Q. Fireman of a locomotive engine?
A. Yes, sir.
Q. How long have you been engaged in that business?

A. About two years.
Q. What engineers have you worked with?
A. With several of them.
Q. Just give their names, please.
A. The first was Bassett.
Q. Arthur Bassett?
A. Yes, sir. Then McCormack—I don't know; several more of them.
Q. Where did you work with Arthur Bassett?
A. In the yard—the Fargo yard—running 52.
Q. Switch-engine 52?
A. Yes, sir.
296 Q. Do you remember the night when Mares was hurt?
A. Yes, sir.
Q. Were you on the engine that night?
A. Yes, sir.
Q. Do you remember when Mares came to get the engine to go down into the yard?
A. I don't remember he come there; some one came.
Q. Some one came and called the engine down into the yard and you went down?
A. Yes, sir.
Q. Do you remember what happened at the times Mares was hurt?
A. I don't remember what we was doing—was backing down the side track.
Q. Do you remember what you had hold of at that time?
A. I couldn't tell how many cars we had; was coupled onto some cars.
Q. Don't know how many cars you had?
A. No; I don't mind now.
Q. Do you remember where Mr. Mares was at the time?
A. He was on the train when we started to back up on the cars.
Q. On what?
A. On the cars.
Q. Do you remember which car he was standing on?
A. No; I don't remember.
Q. You don't remember?
A. No.
Q. When did you next see him?
A. I saw him after we backed down aways; saw him walking back over the middle of the car, I believe; I couldn't tell, but he was on the cars anyhow—back aways; I don't know how far.
Q. Where did you see him next after you saw him walking back — the cars?
297 A. I didn't see him until we backed down opposite of him and saw him sitting on the ground.
Q. You saw him sitting on the ground, did you?
A. Yes, sir.
Q. Well, now, do you remember what happened between the time you saw him walking back on the cars and the time you saw him sitting on the ground?

A. No, sir; nothing more than we was backing up.

Q. Well, you can state if you remember of anything unusual in the handling of the engine between those two times.

A. No, sir; I did not.

Q. If there had been anything unusual in the handling of the engine would you have noticed it?

A. I don't know whether I would or not.

Q. Well, was there anything in the handling of the engine that was sufficiently unusual to attract your attention.

A. No, sir; I don't mind.

Q. How long had you been firing then?

A. I had been firing three months, I think, or four months, I guess.

Q. On that same engine?

A. Yes, sir.

Q. Well, hadn't you been firing long enough at that time so that you would have noticed anything unusual if anything unusual had been done in that engine in the way that engine was handled?

A. Yes, sir; I would.

Q. You were familiar with the way it was handled.

A. Yes, sir.

Q. You don't remember anything unusual about it?

A. No, sir; I don't remember about it.

Q. When Mares was discovered on the ground what was done?

A. I jumped down with the lamp as soon as he spoke; I forget what he said; I jumped down with the lamp.

298 Q. The engine was stopped immediately, when you saw him, was it?

A. Yes, sir.

Q. Who was there when you jumped down?

A. I don't know as there was anybody there. They was shortly afterwards. I hadn't any more than got down when they were there. I got down and was looking at him.

Q. Do you remember what was done with him, or didn't you stay there?

A. They put him on the front end of the engine and took him up to the Headquarters.

Q. Well, did you stay with him, or stay with the engine?

A. No; I got onto the engine again. That's all I know about him. I got sick then.

Q. You got sick from the sight of the wounds?

A. Yes, sir.

Q. Were you sent to take care of the engine by Mr. Bassett then, or did he stay with the engine, too?

A. He run her up to the Headquarters.

Q. Oh, he run her up to the Headquarters; where did you go?

A. I got up on my seat.

Q. That is, when they were handling him around the engine you went up on your seat.

A. Yes, sir.

Q. Then he was put on the engine and taken up to the Headquarters?

A. Yes, sir.

Q. What signals did you see that night when you were backing down there?

A. I had seen a signal to back up; that was all.

Q. Any particular number of cars given to back?

A. I couldn't tell whether it was a signal for cars or to back up.

299 Q. You couldn't tell which?

A. No, sir; it was a signal to back up.

Q. Where were you when that was given?

A. I was standing on the engine.

Q. Whereabouts were the engine and cars?

A. They was on the side track; number five, I believe; backing down on number five.

Q. Backing towards the switch?

A. Yes, sir.

Q. Had you reached the switch yet when that signal was given?

A. No; we hadn't went onto switch number five; just pulled out of number three, I think it was.

Q. Where did the signal come from; way ahead?

A. It came from back near the car some place.

Q. That was before you had reached the switch?

A. Yes, sir; before we reached the switch.

Q. That was after you pulled off from three before you got ready to back?

A. Yes, sir.

Q. After you had gone ahead towards the Headquarters Hotel and stopped, then you received a signal to back; that's all the signal you saw?

A. That's all; yes, sir.

C. H. BAKER, called as a witness in behalf of the defendant, being first duly sworn, testifies as follows:

Direct examination by W. P. CLOUGH:

Q. Where do you live, Mr. Baker?

A. Fargo.

Q. What is your occupation at present?

A. Assistant yardmaster, yard.

Q. How long have you been engaged in that business?

300 A. As assistant since about the middle or the last of last fall. Before that I occupied a position as yardmaster here.

Q. How long were you yardmaster here?

A. It was some time during '81—first appointed.

Q. Some time during '81.

A. Yes, sir; I forget the exact date.

Q. What experience have you had in railroading, Mr. Baker?

A. I was employed by the Minneapolis and St. Louis yard, in the Minneapolis Company in Minneapolis; in their yard about a year

and a half; was then put on the road and run for them between seven and eight years.

Q. Run an engine?

A. Run a train.

Q. As conductor?

A. Yes, sir.

Q. Freight or passenger?

A. Freight at first; from that to mixed; from that to passenger.

Q. What afterwards?

A. I about that time left their employ and went into a little business in Albert Lea and from there came directly to Fargo. I think it was three years past this coming fall, the last of November, and I entered the employ of this company two years ago last fall, on or about the first of December, very near; entered the yard then in charge of Mr. Fulton.

Q. Have been there ever since Mr. Fulton was agent?

A. Yes, sir.

Q. While you were at work in the yard, state if you knew Mr. Arthur D. Bassett, engineer.

A. Yes, sir; he had charge of an engine working in the lower yard—engine 52.

Q. Was he at work under you in that yard in any capacity?

A. In the daytime—I simply was on daytimes. I had no
301 authority over the night crew.

Q. You were in charge of the day crew?

A. Yes, sir.

Q. And whenever Mr. Bassett worked with the day crew he worked under you?

A. He worked under me or with me. I was around.

Q. Did he work steadily in the day crew, or were there changes from day to night?

A. Well, every other week; the arrangements were—I think they were; the same now—one week on nights, the next week on daytimes; I think now, unless I am mistaken, changes every two weeks; so I was told the other day.

Q. You are not engaged in handling trains now?

A. I am. Yes; I am in their employ at present time.

Q. Then what time altogether was Mr. Bassett in your gang or crew, probably, while he was at work for the company? Just give an estimate; of course, it's not expected to be exactly accurate.

A. Well, he was at work in the yard over a year. I can't recollect anywhere near the exact length of time he was employed.

Q. I mean under you. Would he be employed about half the time in your gang?

A. During the daytimes, may be, under my charge, while I had charge.

Q. If he alternated that would make about half the time under you?

A. Yes, sir; about half the time.

Q. Then you had full opportunity of observing his work and the manner he did it?

A. A very good opportunity to find out.

Q. State whether he did his work carefully and faithfully or to the contrary.

A. Well, I know nothing myself that I could condemn
302 him, as far as his work is concerned. He was prompt—promptly on hand and prompt to obey orders.

Q. Did you ever see him do anything while handling cars as an engineer in this yard that was reckless or dangerous to those who worked with him, or property?

A. No, sir; I recollect nothing in particular that I can call to my mind now. He might have made some fast moves, as any engineer will at times, but I know of nothing very positive against him, anything that I could say.

Q. Well, how did he compare with good and safe engineers generally?

A. Well, I have worked with engineers that I should prefer.

Q. I mean so far as safety.

A. I have seen engineers that would be a little preferable to work with than him, although I have nothing that I can recall particularly against him. There are some engineers that seem to have a knack of doing their work. There are a great many worse than him.

Q. I am speaking about engineers in good standing and employed by good roads. How would he compare with them?

A. I think he would rate right along with any of them.

Q. That would be for care and safety in doing his work?

A. I think so, sir.

Q. You had no occasion to report him to anybody, did you, for anything he did?

A. I don't recollect of ever reporting him.

Q. What are the duties in shifting cars in yards of the brakemen and switchmen and crew that ride on top of cars while in motion in respect to looking out for sudden stops and starts of the train, and being prepared for them?

A. Well, the crews in this yard are provided with a foreman and two brakemen, switchmen—men provided for catching cars when it is necessary. At times it is not necessary to ride a car down;
303 at other times it is very necessary; according to the grade of the tracks where they are going on and the amount of room to stop. In some cases it is very necessary for brakemen to ride a car in and to stop it himself. The engineer is supposed to hold the train himself; he expects to do it and is expected to do it.

Q. That is not the question I designed to ask, whether it was necessary. I am talking about the duty of a man on top of the cars being switched in this yard, whether it is his duty to look out and to expect sudden shocks and starts?

A. Why, most certainly; a man on top of a train switching where the reverse is used—the engine is used to stop the train—he may expect to be jolted and jerked at any time with a short stop.

Q. Has he a right to stand on the top of moving cars in the yard without being prepared for such an emergency at any time?

A. He most certainly should be.

Q. How is that as among railroad men generally; is that the understanding?

A. They most certainly should understand it if they don't.

Q. State whether that arises from the necessity of prompt movements in handling or switching cars.

A. Yes, sir; more particularly with a switch-engine. Of course brakemen on the road are expected to stop the train by brakes—a switch-engine in the yard; they receive the signal and they stop to the best of their ability.

Q. For instance, if three cars were being switched in the yard and a brakeman should mount on top of one of those cars, would it be carelessness in him not to be prepared for the sudden checking of the speed at any moment?

A. I should naturally think he would be prepared.

Q. Would it be his duty to be?

A. I should most certainly think so.

Q. Isn't the whole process of shifting cars in a switch-yard
304 a bumping and thumping process?

A. Most certainly.

Q. Can it be done otherwise?

A. By very slow movements.

Q. Is it practicable?

A. Hardly practicable; no, sir.

Q. Is it customary?

A. Very seldom; no, sir. It is very seldom, particularly in a hurry, or, in fact, any time. It is hardly practicable to poke along, as you might say; it delays the work. Of course, it is necessary to use all the safe speed possible in handling cars—making up trains or disposing of trains.

Q. Now, a brakeman riding on the top of cars, as I have mentioned, without exercising proper care and precaution in his position, wouldn't a sudden stop of the cars, if they were moving at the rate of six miles an hour, or checking of the speed, be dangerous to him?

A. Not if he was using proper care, I shouldn't suppose, and guarding or expecting any stop.

Q. And would it not be his duty to be prepared for such a stop?

A. Most certainly, sir.

Q. If he wasn't guarding that would be want of care itself, wouldn't it?

A. Yes, sir; I should consider if I was on the train riding back two cars or one car or any number of cars—I should most certainly be prepared for a stop at any time, not knowing what might occur with the engineer; something may occur that he would be obliged to stop and I not know anything about it.

Q. A signal is liable to come from some other person?

A. Yes, sir.

Q. Is it or is it not true that a brakeman standing on top of a car must at all times expect signals from other parties?

A. Yes, sir.

Q. And be prepared for the emergency?

305 A. Yes, sir.

Q. I will ask you if you have ever known of any railroad man who has been exercising usual care and skill being thrown from the top of cars switching in the yard under the circumstances I have mentioned?

A. I don't recollect of anything of this kind. I recollect of a circumstance in Minneapolis where a man lost one of his legs by the engineer receiving a signal from another yardman; this man wasn't expecting it and was jerked from the top of the train.

Q. Wasn't prepared for it?

A. Wasn't prepared for it; was sitting on the brake-head and by the sudden starting of the train was thrown down between. The rear portion followed along for a short distance, just sufficient to take one of his legs off.

Q. That is, he was sitting on the top of the wheel?

A. Yes, sir; he was not expecting the train to start at all. That was almost entirely his own carelessness in that case—almost entirely—because it is not necessary to sit on the brake-staff.

Q. Well, is it necessary to stand on the top of the car without getting the support of the brake-staff?

A. Certainly you can if you stand a sufficient distance from the end.

Q. I say is there anything that makes it necessary to stand on the top of a car; is there any reason why a man can't hold on?

A. Oh, certainly, he can hold on if he wants to; it isn't usually necessary.

Q. If he is attentive it isn't necessary?

A. No, sir.

Q. Do you know Richard Mares, the plaintiff in this case?

A. Yes, sir.

Q. How long have you known him?

A. I forget the exact date; it is some—I should think over two years; between two and three years, I think.

306 Q. Do you remember when he was hurt?

A. I remember about the date.

Q. Did you see him after he had been hurt, while he was in Fargo?

A. I went up to his room in the hotel, the room where he lay, after the amputation.

Q. About how long was that after he had been hurt?

A. Well, it was a short time after the amputation.

Q. Did you converse with him?

A. I did; yes, sir.

Q. Did you converse with him as to how he got hurt?

A. Well, I think, as far as I can recollect, I asked him what he had been doing; how he come to meet with such an accident. It's so far back I don't recollect the exact conversation.

Q. Well, the substance of the conversation, if you don't remember the exact words.

A. Well, I couldn't say exactly whether he said he was thrown off or stepped off, or how it was. At least, I am quite sure it was to the substance that he lost his balance from some cause or other. I

don't know whether it was from stepping off the train or by the movements of the train; I could not say positively.

Q. You don't remember that?

A. I couldn't say positively; no, sir; because it was simply a conversation between us. I didn't think anything further about it; it's quite awhile back.

Q. Do you remember whether he charged the engineer with having slacked the speed of the train unduly?

A. I remember nothing of that kind. My recollections are not positive enough to state precisely what he said at all.

Cross-examination by THOMAS WILSON:

Q. You don't remember what he said; so you wouldn't swear to what he did say?

307 A. I don't remember positively.

Q. You wouldn't pretend to state what he did say, Mr. Witness?

A. Not positively. My recollection of the conversation is too indistinct to state positively the precise words he said.

Q. How long was it after the amputation?

A. I couldn't say how long it was; it was some little time, may be half an hour, possibly; it might have been that; might have been longer.

Q. That is your recollection, about half an hour?

A. Yes, sir.

Q. While the amputation went on he was under the influence of anesthetics?

A. I suppose so.

Q. Do you think half an hour after that man had both limbs taken off——

A. It might have been half an hour; might have been an hour and a half.

Q. Do you think half an hour after that man had his limbs cut off and had taken an anesthetic to stupify him so as to have them cut off he was in a condition to go on and explain and talk about such a thing?

A. I don't know. I say I don't remember whether it was half an hour or an hour and a half; in my last answer I say I don't know whether it was half an hour or an hour and a half.

Q. A person would hardly naturally suppose a man would recover from an amputation like that the effects of the ether, or whatever they used, in that short time?

A. It might have been longer than that; it was evening. I came up to see him after I heard of the accident.

Q. It was in the evening?

A. Yes, sir.

Q. In the night, before daylight?

308 A. Yes, sir; it was in the evening I saw him. It must have been the evening afterwards.

Q. Will you swear it was the day after?

A. I won't swear to anything of that kind at all.

Q. Will you swear that it wasn't on the night on which he was hurt you saw him and had this social talk with him?

A. It was in the evening, sir; I saw him in his room. It might have been the evening afterwards; as I recollect afterwards, I thought it was the evening of the day it occurred.

A. And you say you can't remember to give anything that he said now? If you can remember anything he said give it to this jury—if you can remember anything.

A. Well, as I remarked before, I asked him how it happened that he was injured—how it came; and, as I said, I think he either lost his balance or was thrown off; I don't recollect distinctly.

Q. Can you remember anything he said?

A. Nothing positively.

Q. Then he may have said he was thrown off?

A. He might have said he was thrown off; might have said he was thrown off; might have said he stepped off. As far as positive recollection goes, I can't say now.

Q. Have you any recollection about it?

A. I can't say anything positive as far as that question goes.

Q. What else? Did you ask him at that time about anything else?

A. I don't remember anything else.

Q. How long were you in there?

A. I think I staid in there, may be, ten or fifteen minutes.

Q. Will you swear you did?

A. I think so.

Q. Who was present?

A. There was a young woman there, I think—came in after.

Q. That's all?

309 A. That's all I remember now being in there.

Q. Is there an upper and lower yard here?

A. Yes, sir.

Q. How is that?

A. There is an upper yard that does the work from trains arriving from the west going east, and a lower yard for trains coming from the east going west. There was a separate crew for each yard.

Q. Now, Mr. Witness, were you all the time in the same yard Mares was in?

A. I was in both yards about that time, backward and forward. During the earlier time of his employment I was working in the same yard—the lower yard. I didn't have charge, but afterwards took charge of both yards.

Q. Did you have charge of the yard he was in while you was in it?

A. Daytimes?

Q. No; in the early part.

A. In the early part of my employment in this yard I went to work as switchman.

Q. Now, then, how long were you switchman in the same yard that Mares was in?

A. Well, I worked as switchman in that yard all of the winter—all of the balance of that winter.

Q. What winter was that, please?

A. Three years ago this coming winter—this coming December.

Q. '83; then it would be December, '80?

A. Yes, sir; when my first employment started.

Q. Or '81, which?

A. '80, I should naturally suppose.

Q. Which was it—'80 or '81?

A. '80, I think, sir.

Q. Are you sure of that?

A. I am, quite sure.

310 Q. In December, '80, you commenced, then, and stayed how long, Mr. Witness?

A. How long I worked as switchman?

Q. Yes, sir.

A. I worked during that winter and into the summer; was then promoted.

Q. Until the next summer; that was the summer of '81?

A. Yes, sir.

Q. At what time were you promoted?

A. I forget the exact date.

Q. Well, about, as near as you can.

A. I have kept track of it; no positive recollection when I was appointed as foreman of the crew, but it was during that following summer; I ain't positive.

Q. Even then you were under a yardmaster?

A. I was under Mr. Fulton's orders; subject to his orders all the time.

Q. And Fulton was yardmaster; he had charge of the whole yard?

A. Yes, sir.

Q. During that time you were switchman was either Mares or Bassett in the yard?

A. Mares was in the yard.

Q. That was the winter before the winter he was hurt?

A. Yes; I think the first winter I was here—during the winter, in the latter part of the winter; I think Mares was employed as switchman at the same crew I was switching with.

Q. Bassett wasn't in the yard at that time?

A. I forget exactly when Bassett came. There was a man by the name of Buckley running the engine at that time.

Q. Bassett, according to your best recollection, wasn't in the yard at all at that time?

311 A. I don't remember positively; when he first came Bassett wasn't switching in the lower yard.

Q. During any of the time you were switching in the yard was Bassett engineer before you were promoted to be foreman?

A. Bassett was, I think, at that time—when I first came; I think he was employed in the round-house handling engines.

Q. Then you had nothing to do with him?

A. Not at that time, I think.

Q. In the summer of '81, then, you were promoted, not to be yard-master, but merely to be foreman of the switchmen?

A. That's it.

Q. In charge of the yard—the upper and lower yard—were you?

A. Well, I was at first appointed in the upper yard.

Q. How long did you remain there, Mr. Witness?

A. I think it was all of the balance of that summer. Well, I forget the exact length of time?

Q. Give it as near as you can; I want the jury to understand.

A. It's a pretty hard question for me to answer. That's a pretty hard question for me to give anywhere near any positive answer.

Q. Was Mr. Bassett in that upper yard or the lower yard?

A. Bassett, when I first saw him running an engine around the yard, he run number eleven, I think, in the upper yard.

Q. Are you sure?

A. I am quite positive.

Q. How long were Bassett and you in the upper yard together?

A. Well, he was off and on; I think he was changed. There was a man by the name of Allen run that engine most of the time, but Bassett was put onto it several times.

Q. I want you to state to this jury how long you and Bassett were in the upper yard together; give us as nearly as you can possibly

A. I am not positive; anywheres the remotest idea that I could give any information.

312 Q. You haven't the remotest recollection in reference to that?

A. It may have been a very short time or may have been longer. It was rather a short time, I think, he was on that engine in the upper yard.

Q. Wasn't it in your recollection a very short time?

A. Yes, sir; I think the majority of his work was done in the lower yard with engine 52, to the best of my recollection.

Q. Have there ever been two Bassets in this yard running engines while you was there?

A. I don't know of any. I know only Arthur Bassett.

Q. How long were you in the lower yard with Bassett?

A. Most of one season—one summer, I think.

Q. Well, state to the jury how long. Now, I want to get at that.

A. I should say two or three months, at a rough estimate.

Q. Would you swear positively as to that?

A. I wouldn't swear positively whether it was two or three months.

Q. Would you swear positively you were two months with Bassett in the lower yard?

A. I would; yes, sir.

Q. That is the best of your recollection?

A. To the best of my recollection.

Q. In the upper yard it was a very short time?

A. Yes, sir.

Q. Might not have been over a week or two?

A. I should think it was longer than that.
Q. Would you swear it was a month?
A. No, sir; I should think it was between two weeks and a month.
Q. Besides, where were you with him in the lower yard—where else were you?
A. That was the only place.
Q. And were you night man or day man?
A. Well, the majority of my time was in the day.
313 Q. Bassett was night and day?
A. Yes, sir; night and day.
Q. For these two months you swore to you had only been half that time with Bassett?
A. Half of that time.
Q. It's not an uncommon thing for a brakeman to be on top of a car, is it?
A. It's not uncommon; no, sir.
Q. The engineer regulates the engine, but he does it from the signals of the brakeman, does he not?
A. Is supposed to.
Q. That is his duty to?
A. That is his duty to receive signals and obey them to the best of his ability.
Q. In doing this kind of work the engineer, you say, gets signals from the brakemen. You have heard the other engineers here explain that they look out on one side of the engine and the fireman on the other, and if it's in the night they get their motions from the lamps in that way and thus take their signals?
A. Yes, sir; receive their signals from the lamps in the night.
Q. And it is their duty to follow those signals?
A. Yes, sir.

Redirect examination by W. P. CLOUGH:

Q. You answered that it was the duty of the engineer of a switch-engine to take his signals from the brakemen, &c. If the brakeman were to give a signal simply to back or to back a certain number of car-lengths, would that take away from the engineer the right or duty of exercising his judgment as to the proper rate of speed of making that back—if the engineer should receive a signal to back up, say, seven cars?
A. He is supposed to use his judgment and back up as soon as he can do it, only watching for signals.
314 Q. Is it the duty of the engineer to so handle his engine as to keep it under control?
A. He should keep his engine under control, most certainly.
Q. Is it not particularly so in the night time?
A. Most certainly; I should naturaly suppose an engineer would want to go a little more careful in the night time from the fact that he can't see—has only the signals.
Q. He should keep his engine under control so that no accident can happen?

A. To keep her under control so that he can stop on pretty short notice for any purpose.

Q. What is it about engineers working in the upper and lower yard? If an engineer is set to work in the lower yard does he always stay there and never go up in the upper yard?

A. He sometimes runs up into the upper yard for some purpose, to get cars or to take cars, but the territory that he is given in charge of, to work in, he usually stays there and does his work, only an occasional run to the other yard.

Q. The most of the time he stays in the yard, but doesn't it frequently happen—doesn't it happen every day—that it is necessary to move cars from one yard to the other?

A. Yes, sir; there's hardly a day passes but what it is necessary to take cars from one yard to the other.

Q. So, notwithstanding Mr. Bassett and you might not have worked in the same yard, that would not prevent your observing his work and his manner of doing it?

A. Well, I had a pretty good chance to observe his work.

Q. He had to be in your yard every day he was in the other yard?

A. Sometimes he would be there. He would have to pass through that yard coming from the shops to the lower end.

Q. So you would see him most every day?

A. Yes, sir.

315 Recross-examination by THOMAS WILSON:

Q. You said he was off and on a number of times—Bassett?

A. Yes.

Q. Now, in your last answer to the counsel, you stated that in the night the engineer would be more careful—ought to be more careful—than in the daytime?

A. He would naturally feel more inclined to be.

Q. It would be his duty to be, wouldn't it?

A. Yes, sir.

Q. Because everything cannot be seen and accidents are more likely to happen?

A. Yes, sir; he can't see anything, only his signals.

S. G. FULTON, called as a witness in behalf of the defendant, being first duly sworn, testifies as follows:

Q. Where do you reside?

A. I reside at present at Helena, Montana.

Q. What is your business?

A. I am an employee of the Northern Pacific Railroad Company, representing their interests in Montana as general agent.

Q. General agent in Montana?

A. Yes.

Q. How long have you been in the employ of that company?

A. It's now very nearly ten years.

Q. How many?

A. Very near ten years; ten years this coming summer.

Q. What have you done during that time?

A. Well, have served them in a number of capacities, various capacities; station agent and division freight agent and my present position; probably ten or a dozen different capacities at different times.

Q. Had you had any experience in railroading before that?

A. No, sir; excepting a slight experience with the St. Paul
316 and Duluth road.

Q. You may state if you served in any capacity in Fargo.

A. I came to Fargo as station agent in the summer of 1880.

Q. How long did you retain that position?

A. I remained in charge of the station here until December, '81; about a year and a half.

Q. What were your duties as station agent in respect to the yard here?

A. Well, at that time the yard was a portion of the station work, such as to handle freight. I had immediate control of the yardmen; appointed a day man as day yardmaster and another man as night yardmaster; they were both under my immediate control.

Q. Then the foreman of the yard had his gang and the engineer, and so forth; were all under your control while in the yard?

A. Yes, sir; it was always acknowledged that the engineers while in the yard were under the control of the yardmaster after they left the round-house.

Q. So they were all under your control?

A. Yes, sir; to a certain extent.

Q. You may state whether that brought you into knowledge of what was going on in the yard.

A. It did; it gave me occasions through certain seasons of the year to be perfectly familiar with it on account of our not always having force; we have had to do the work; I was often obliged to get out with men myself and do a certain amount of yard work. I was with them a great deal.

Q. Do you know Arthur D. Bassett?

A. Yes, sir; I knew him; an engineer in the yard a portion of the time I was agent.

Q. Do you remember during what portion?

A. Well, that I could not say definitely, because it was a long time since; I remember him perfectly well; remember of
317 having occasion to get on his engine going through the yard; knew the man very well, as I knew other engineers; I could not say the number of months he run in the yard while there.

Q. Did you observe him frequently while he was in the yard?

A. While he was in the yard I had occasion to observe him frequently; all the time he was in the yard.

Q. Now, if there were any misconduct on the part of any of the yardmen or engineers in the yard, to whom would it have been reported?

A. It would have been reported to me directly.

Q. You were the proper person to whom to report that sort of thing?

A. Yes, sir.

Q. Now, while you were station agent here and while Bassett was working for you in the yard, did you hear of any conduct on his part while handling cars in the yard with his switch-engine that would be regarded as reckless or dangerous to the men that worked with him?

A. I have no recollection of but one instance—that was hardly a case that would cover his question, perhaps—that it was dangerous to the men working with him. I considered it a case of poor judgment, under the circumstances, when he ran up in the face of a stock train.

Q. That's the one you referred to, was it?

A. Yes, sir.

Q. I am speaking about his conduct in handling cars in the yard with that exception; that was the only one you heard of?

A. Yes, sir; I have no recollection of any reports to me, either verbal or written.

Q. In that one occasion did you understand that was done by authority or orders he received from his superiors?

A. Yes, sir; I can give the whole affair.

Q. I would like to have that explained.

A. The circumstances were simply these: There was a stock train coming in special into the yard; of course, under the rules of
318 the yard all trains coming in, especially freight trains—not all trains, but freight trains and wild trains—coming into the yard should come to a full stop when they come to the switches; that leaves the yardmen at liberty to go on with their work without being prepared. In this instance there was a special stock train coming in; I immediately sent orders to the yardmaster to keep the main track clear; I didn't give any details how he should do it—anything of that kind—only to keep it clear; he gave orders to the engineer to run up and get on a certain side track south of the Headquarters Hotel.

Q. Who did?

A. The yardmaster.

Q. Do you know that?

A. I know that to be his statement of the fact to me. (Objected to.) What I saw was in stepping out on the platform. The engine was coming up through the yard and the stock train was coming from the west; it was after dark; the head-light shown very bright; you could see it was coming right towards us; the switch-engine still kept running west towards the train that was coming in, passed over the switch which was thrown for them, or attempted to be, and there seemed to be a catch in the rail; it didn't work right, and they ran back and immediately run off. I stood on the platform and saw all of it, and I did see, while they were running, the brakeman at the switch and also the brakeman on the engine giving repeated signals to go forward, and the engineer was obeying them; I blamed him for his lack of judgment in not refusing, under the circumstances, to obey the signals.

Q. You saw the orders to go ahead given?

A. I saw the orders to go ahead given; I saw the switchmen swinging their lamps violently to go ahead.

Q. What you blamed him for was simply for not disobeying the orders?

A. I thought, under the circumstances, he should have stopped his engine right there, not taken any chances, although the man
319 had a right to believe some one was in the upper yard to stop the incoming train and give him ample space to go ahead and pass over the switch.

Q. In other words, he had a right to believe that the order was given properly?

A. He had a right to believe so; yes, sir.

Q. Do you know Mr. Galvin—Mr. Daniel Galvin, I think, is his name?

A. Yes, sir.

Q. In what capacity was he employed while you were there?

A. Well, he came as brakeman, switchman in the yard; afterwards promoted by me to be night yardmaster.

Q. State if your position brought you into frequent contact with him in the yard.

A. It did very often; he was under my immediate orders.

Q. He was subject to your immediate orders?

A. Yes, sir.

Q. If he had observed any recklessness or carelessness on the part of an engineer or any other man in the yard what would have been his duty in that regard?

A. His duty was to report him to me.

Q. Would that have been true of any recklessness on the part of Mr. Bassett?

A. Certainly.

Q. Did he ever report anything of that kind to you?

A. I have no recollection at this date of any particular report in regard to Mr. Bassett, although I would like to be allowed to say here that among yardmen there are frequent complaints of little affairs that happen that would not perhaps affect a man's standing as a railroad man——

Q. You say you have no recollection of any complaint?

A. I have no recollection of any specific complaint against Mr. Bassett.

320 Q. I am speaking about his handling cars in the yard in a reckless or dangerous manner, dangerous to the other employees.

A. That's the way I understood it.

Q. If there had been any complaint of that kind you would have recollected it?

A. My memory is pretty good; I think that I should.

Q. You would have acted upon it?

A. I certainly should.

Q. With the single exception of the one case you have mentioned, you never observed anything in the conduct of Mr. Bassett while at

work in the yard that would be dangerous or reckless to the lives or limbs of the men with whom he was at work?

A. Nothing that would be dangerous to the men working with him or to others. I have seen him running after he was through with his work; running to the shops at a faster rate of speed than there was any need of, and called Mr. Rupert's attention to it and had it checked; but he was not the only one in that case. There were other engineers the same; but he didn't endanger any one's life, either on the engine or otherwise, in doing it; merely unnecessary speed.

Q. Do you know Mr. Richard Mares?

A. Yes, sir.

Q. How long did you know him?

A. Well, I had him in my employ I don't know how long, for a certain time during the winter previous to the time he was hurt—the winter of 1881—and I can't say how long I had him in my employ at that time. Of course I knew all my men very well; had occasion to meet them and see them about their work.

Q. Do you remember when Mares was hurt?

A. Very well, indeed.

Q. How long after he was hurt was it before you first saw him?

A. Well, I was called immediately and saw him; it certainly could not have been long after the accident happened. It
321 was Mr. Galvin himself—I think it was. I was called, anyway, by some of the yard crew, and went to him immediately.

Q. You were called to get him in the house?

A. Yes, sir; I was called to make arrangements about getting a room for him and taking care of him, as I was in all cases whenever any of my men were injured.

Q. You did get him in the house and taken care of?

A. I had a room provided for him in the Headquarters and a doctor called.

Q. Did you ever have any conversation with him as to the manner in which he got hurt?

A. Yes, sir; I did.

Q. When was that?

A. Well, the first — when there was an opportunity to have any conversation—as soon as he was laid out in the bed in a comfortable position so that he was in shape to talk—I immediately asked him how it happened, as I naturally would——

Q. When was that?

A. That was in the morning he was injured.

Q. Before or after the amputation?

A. That was before.

Q. Well, go on.

A. I immediately asked him how it happened.

Q. State what you said and what he said.

A. My first remark was, "Dick, how did it happen?" His reply was, "I was standing on the car, on the rear car that we were switching, giving the signals to the engineer, and I had to give them three or four times before he got the signal; I got all out of patience and

excited giving the signals to the engineer to back up; I was obliged to repeat them several times before he got the signal, and when he did so—that is, when he received and saw the signal—I stepped back onto the car, supposing that I was standing about the middle
322 of the car, and stepped immediately off the end of the car." That he had miscalculated his distance.

Q. Did he say that?

A. Well, I have given the words so far——

(By attorney for plaintiff:) That he had miscalculated his distance?

A. Well, I am not putting that in as part of his words, and in connection with that, after stating that he had stepped off the end of the car, he said that he made a grab for the brake-rod and caught it with one hand; that he held the lantern in the other hand, or had held it, and dropped that. He stated to me he made a grab for the brake-rod with one hand—the left hand—held the lantern in the right, and grabbed the rod with the other; he caught it, but having on a mitten it slipped down the rod; he wasn't able to grasp it to hold himself; slipped and fell between the tracks, between the two rails.

Q. Anything further said about it?

A. He then explained that after striking he threw his body out from between the rails, but was unable to get his limbs out; caught him and run over both ankles between the knees and feet.

Q. Anything else?

A. Well, of course, we had general conversation in regard to it. I talked with him; of course, my sympathies were aroused to see a man——

Q. What we want is to have what you stated, not your feelings. State whether anything more was said.

A. I say we had a general conversation which I wouldn't attempt to repeat.

Q. At that time was he in full possession of his consciousness and faculties?

A. I believe so; as much as he is to-day.

Cross-examination by THOMAS WILSON:

Q. You live in Helena now?

A. Yes, sir.

Q. How long have you lived there, Mr. Witness?

323 A. I went out there in January; reached there the 16th of last January.

Q. You are general agent of the company there?

A. Yes, sir.

Q. You are the representative of that company in that Territory?

A. Yes, sir; in certain departments.

Q. What departments?

A. Well, for freight, passenger, and express business.

Q. Well, then, really, that's for about everything, isn't it?

A. Except the land department.

Q. Excepting the land department, you are the head of the Northern Pacific Railroad Company in Montana?

A. Yes, sir.

Q. How long have you held that important place?

A. Well, when I first went there, in January, it was more particularly in connection with freight. I was given the passenger and express business the first of April.

Q. You have been there, you say, how long?

A. Since last January.

Q. You were here before that time?

A. Yes, sir.

Q. What was your business here?

A. As division freight agent.

Q. How long had you been division freight agent?

A. Well, it was about as close to one year as you could get it—a few days over.

Q. Before that what were you?

A. I was agent here—at the station here at Fargo.

Q. That is what you were at the time of this accident?

A. Yes, sir.

Q. What duties did that require of you? State fully.

A. It required the full charge and responsibility of run-
324 ning the station; everything connected with it.

Q. The tickets?

A. No, sir; with the exception of ticket and express business, which was separate.

Q. The receiving and shipping of freight?

A. Yes, sir.

Q. All freight business whatever?

A. Yes, sir.

Q. In other words, you were the representative of the company here then?

A. Yes, sir.

Q. Well, the receiving and shipping of freights must have taken a great deal of your time?

A. No, sir; I had to depend upon my cashier almost entirely for the running of the office. I was allowed sufficient office help; was expected to be outside a good deal.

Q. Hadn't you the responsibility of attending to those matters?

A. I certainly had the responsibility; I had competent men under me.

Q. You had men under you, but you were made the head?

A. Yes, sir.

Q. Wasn't a great deal the most important part of the company's business here the receiving and shipping of freight?

A. To the company it was, of course. It was done in different ways.

Q. Immensely the most important part of it was, wasn't it?

A. Do you refer to the reception of local freight to the town, or freight passing through here?

Q. Well, both. The freight department you had charge of was the most important department you had charge of at that time?

A. Yes, sir.

Q. And the amounts involved were very large?

325 A. Yes, sir.

Q. Were you responsible for the funds?

A. Yes, sir.

Q. Then, as a matter of fact, you had to have an eye on that very closely; any mistake you were responsible for?

A. I had a cashier in whom I had special confidence.

Q. But you being responsible for these funds, you felt a very deep interest in it?

A. Most certainly.

Q. Well, as station agent, the yard was under you?

A. Yes, sir.

Q. Well, you don't pretend to say that you, having such a responsible position here, were in that yard working with your hands very much, do you?

A. I pretend to say I was in the yard a great deal—in the yard a great deal more than I was in the office.

Q. You were outside of the office door more than you was in it. Do you mean to say you worked in that yard?

A. I don't mean to say I made the couplings myself. I mean to say that I oftentimes went into that yard and took the check of trains and turning switches when we was short of men.

Q. About how often would you do that, probably, in a year and during the time Bassett was there?

A. Do which?

Q. What you have stated about going out and turning switches.

A. Assisting the yardmen?

Q. Yes, sir.

A. I wouldn't attempt to give any average on it at all. I know I was there a great deal.

Q. About how many times a day would you be out paying attention to that away from the other work?

A. There was days I didn't make any pretense to be in the

326 office an hour out of the whole twelve; oftentimes remain up until midnight; put the greater portion of that in in the yard.

Q. What did you do in the yard?

A. I gave every assistance to the yardmen I could.

Q. What did you usually do?

A. I had occasion to go back and forth through the yard.

Q. To do what?

A. To do other work, whatever it might be.

Q. Do you mean to say that you yourself, personally, as a rule—as a general thing—gave orders, for instance, to the switchmen what to do?

A. I gave it to the yardmaster.

Q. And he himself went and saw it carried out?

A. He was with them at that time. At that time we had a small force.

Q. You spoke to him and he saw it was carried out?
A. Yes, sir.
Q. Who was that yardmaster?
A. In the daytimes it was Mr. Baker.
Q. Who in the night?
A. At the time of the accident Galvin was night yardmaster.
Q. Will you swear positively before this jury that Galvin didn't repeatedly make complaint to you about Bassett, as Galvin swore here yesterday?
A. I will swear to this jury, to the best of my knowledge and recollection, I know of no special reports made by Mr. Galvin about his reckless conduct, or Baker, who had him as much as Mr. Galvin.
Q. Will you swear positively to this jury that Mr. Galvin didn't frequently make complaint to you about the conduct of Mr. Bassett, as Galvin yesterday swore he did?
A. I would be willing to swear that he didn't frequently. I wouldn't swear that he never did. I would swear that he
327 never did, to the best of my recollection.
Q. You say you would be willing to swear he didn't do it frequently, but you wouldn't swear that he never did?
A. Yes, sir.
Q. And you wouldn't swear he didn't make complaint of the kind and for the reasons that he here stated yesterday, would you? You wouldn't swear that positively to this jury?
A. I am not aware what he stated here yesterday.
Q. Were you here?
A. Part of the time.
Q. As to the misdoings of Bassett as engineer, will you swear that he didn't make such complaints to you, just as he swore?
A. I think I have answered that question as nearly as I can. I have said I would be willing to swear he didn't make such reports frequently. I wouldn't swear that he never did it at this late day. I stated also, to the best of my recollection, he didn't.
Q. The way you stated it on your direct examination was that you had no recollection that he did. Wasn't that about it?
A. Yes, sir, exactly; that is what I intend to say now at this late day.
Q. And you put in, too, that he made no specific reports?
A. Yes, sir; exactly.
Q. That is the way you mean to put it now, is it?
A. Why, most certainly.
Q. You stated here that Bassett at one time ran off there; you have spoken about the way he ran?
A. Yes, sir.
Q. That you saw him given signals for doing thus and so?
A. Yes, sir.
Q. Wasn't he discharged for doing that?
A. My recollection is that he was suspended.
Q. Very well, then; you mean to swear to this jury that
328 Bassett was suspended for doing his duty?

A. No, sir; I don't.

Q. Wasn't it his duty to do what he was signaled to do?

A. That matter could not be answered by direct questions and answers.

Q. Didn't you carry the impression to the jury in your direct testimony that the brakeman on the step signaled to him to do that, when he did it?

A. Exactly; the men who had charge of the engine—the brakeman and switchman.

Q. Wasn't it his duty to go ahead when they signaled to him?

A. As a matter of railroading it was.

Q. Very well; then you swear to this jury Bassett was discharged for doing his duty?

A. I do not; I didn't swear that he was discharged then.

Q. Then suspended or laid off for doing his duty?

A. I think I have stated it very clearly. I considered it an error of judgment on his part.

Q. You say it was his duty to do it, don't you?

A. It is a matter that cannot be answered by yes or no. There is a conflict involved in the matter and testimony of the yardmen in regard to it in addition to what I saw. I claimed at that time, notwithstanding the signals, under the circumstances, he should have disobeyed them. It was a case where a man should positively disobey orders. I don't claim because a man has orders to go out on the road properly signed and "O K'd" and he finds he is going to run into a train he should go ahead. He should refuse and disobey orders.

Q. Who suspended him?

A. Mr. Rupert.

Q. Who suspended him the other times he was suspended during that year he was here?

A. I don't know anything about the other case whatever.

329 Q. Who reported him to Rupert at this time he was suspended by Rupert.

A. I never reported him for dismissal or suspension excepting that once. Somebody else must have reported him to Rupert when he suspended him.

Q. At this time?

A. I say that I done it for this thing—for this running up there. I advised his suspension.

Q. Didn't you state in your direct examination that you never reported Bassett for misconduct in the yard?

A. With one exception.

Q. Didn't you state in your direct examination that you never reported him; you stated with one exception you never saw him do anything to find fault with; didn't you state in your direct examination you never reported him?

A. If I so stated it was with this exception, which I was particular to call attention to.

Q. Do you know the other times who reported him?

A. I don't know anything about it. I didn't know as he was suspended while I was running the yard again.

Q. You don't know who reported him when he was discharged?

A. He has been discharged lately. I was out of the country and knew nothing about it.

Q. How long ago was he discharged?

A. I heard it stated last summer.

Q. Do you mean to say he was discharged after you left here?

A. That's my understanding; that he was employed after I went away from here.

Q. When did you leave here?

A. I left here the 8th day of last January.

Q. That is, of January, '83?

A. Yes, sir.

330 Q. Well, do you say Bassett wasn't discharged while you were here?

A. I have no recollection. My recollection is now that he was suspended for this one affair; that's the only one I know of.

Q. Will you swear that Bassett wasn't finally discharged from the company before you left?

A. I won't swear anything about Bassett further than that he was not in my employ. I wasn't supposed to know what was done with him.

Q. You were yardmaster until you left here?

A. No, sir; I never filled that position.

Q. Station agent?

A. No, sir; I was for a year division freight agent. That relieved me from all yard work.

Q. When did you become division freight agent?

A. January 1st, '82.

Q. About any other matter save this one which you did report you know nothing about it?

A. I have no recollection.

Q. In fact, you wouldn't pretend to say you have a recollection of all the transactions or all the reports that might have been made on this matter at this late day?

A. No; I wouldn't undertake to say that, of course. I would like to be allowed to say this: I never was slow to take notice of anything of the kind and immediately complain to Mr. Rupert. If it had occurred I would have done so.

Q. Your duties involved matters of great magnitude both then and since, and you wouldn't now swear that you so charged your mind with these little matters that you would remember all the reports made to you of misconduct, now?

A. There are certain things I shall remember all my life; others I shall not.

331 Q. You do not swear positively but what you may have forgotten some reports made to you about Bassett?

A. I don't remember every little thing. I don't think any man has a memory to do that.

Q. You came here from Helena to testify in this case?

A. I have other business here.

Q. You were brought here for that?

A. I was subpœnaed by our company as a witness—as the one knowing about the affair, of course.

Q. You say you were subpœnaed. Do you mean to say you were subpœnaed in Helena?

A. I was notified I should be wanted.

Q. You came here for this?

A. Yes, sir.

Q. Now, about this conversation with Mares. I wish you would now commence and repeat, as far as you can remember, every word you said to Mares and then every word Mares said to you at that conversation.

A. Well, as soon as he was in shape to talk to I asked the question: I says—which I remember very distinctly, as well to-day as the next—"Dick, how did this happen?" He answered that he was standing on the—that they was switching in the lower yard—he was standing on the rear car giving signals to the engineer, and was obliged to repeat them several times before the engineer got the signal; that when he did catch it that he stepped back onto the car, supposing that he was standing long about the middle of the car, but that it proved that he was close to the end, and that he immediately stepped off the end of the car and fell and dropped his lantern, which was in his right hand, made a grab for the brake-rod with his left hand, caught the rod, but, having a mitten on, that it slipped down and he dropped down between the rails; and then, realizing his position, he threw his body out over the rails, but was unable to throw his legs out, and that the car, then back-
332 ing up, ran over both legs and crushed them. That was his statement to me when we had the conversation.

Q. What did you say to him that brought this out? Give your words, as near as you can remember.

A. I have already stated; I says, "Dick, how did this happen?"

Q. That was all?

A. That was enough to call for a full account of it.

Q. I want every word you said, as near as you can remember, during that interview?

A. I have already testified on this thing. Now, then, there was a general running conversation afterwards which I will not attempt to repeat. But that part of it I remember as distinctly to-day as I did the very day that it occurred.

Q. Well, can you remember another word that you said to him or that he said to you that you haven't given? If so, give it to us.

A. I can remember the words of sympathy that I expressed to him; I told him we would take care of him; would do the best we could, and words to try and cheer him up, as any one would under such circumstances.

Q. I want what you said and what he said; give us every word you said to him, as near as you can remember.

A. I can remember, of course, of his groaning and taking on.

Q. Well, state what he said.

A. It was in this way, as I said, of a general running conversation that would not be charged upon my mind. I had occasion to make out reports—to report this matter——

Q. If you can't remember any other word that was said, say so; if you can remember any other word, state it.

A. I have already stated some other words I do remember.

Q. If you can remember one other word, repeat it.

A. I have already stated that he groaned and complained that he was wrecked for life, and I said any words of cheer that I
333 could call to mind at the time.

Q. But you can't remember anything you said more than you have stated?

A. I can remember I told him we would take good care of him—see that he had proper attention—and he should not want for care on our hands, and I visited him very often; I presume——

Q. I have asked you over and over again if there was another word said by you to him or him to you to state it.

A. I says, "Dick, we'll take care of you; we'll do the best we can."

Q. If there is anything more that you said than you have stated already, state it. If you can remember another word you said to him or he to you.

A. I think I have stated a good deal; the interview didn't last very long at that time—the interview at that particular time.

Q. If you don't remember any more, say so; if you do, give it.

A. I have no recollection of any exact words used at that particular time, because, as I say, the interview was short.

Q. How long was this after the injury to him?

A. Just as soon after as we could get him into the hotel—into the room—and placed there where he could be someways comfortable.

Q. It was before the amputation?

A. Yes, sir.

Q. Was it before daylight?

A. No; I remember very well the light was coming into the window; we had no lights lit in the room.

Q. There was no artificial light in the room?

A. I have no recollection of any artificial light.

Q. Was there or was there not, according to your best recollection?

A. There was not.

Q. Who was there present at that conversation?

A. At this particular time I have no recollection of any
334 one present, but at subsequent interviews——

Q. I am talking about this time.

A. I have no recollection of any one being in the room at the time.

Q. You swear no one was present?

A. No, sir. I wouldn't, because the boys were coming and going; might have been there part of the time during our talk and out again.

Q. Had the surgeon got there yet?

A. No, sir; he hadn't.

Q. Did you stay until the surgeon got there?

A. I was in and assisting at the time.

Q. Did you stay until the surgeon got there at this interview?

A. To the best of my recollection, I was in the room at the time the surgeon came.

Q. At the time of this interview, did you remain there until the surgeon came?

A. I would not say that I did; it was a time of excitement when we were preparing for him.

Q. There may have been others there, but you don't remember of any one being there?

A. I know there were others there—coming and going.

Q. During the time of this conversation?

A. Yes, sir; coming and going; not any one in there all the time.

Q. Where was Dick? How was he—lying or sitting?

A. He was lying then on his back in bed.

Q. Anybody else talking to him during the time but yourself?

A. Well, they didn't interrupt our conversation at all.

Q. From the time this conversation commenced until it ended, all the conversation you had with him then; nobody else said anything to him or him to anybody else?

A. No; I am quite positive they said nothing to him. They might have spoken to me; I might have been called or spoken to about something.

335 Q. But you don't remember about that?

A. No, sir.

Q. You can remember no one that was there—no one?

A. I don't remember of any particular person. I remember that the boys——

Q. If you remember any one that was there state me his name; I would like to find out.

A. I have already stated that there was no one permanently in the room; the clerk of the hotel was there to get things; the yardmen were up and down——

Q. If you can remember any one individual, man, woman, or child, that was present when this conversation took place, give me that name.

A. I say I don't think there was any one present during the whole conversation.

Q. If there was any one whose name you can remember who was present during any part of this conversation, please give me his name.

A. Well, my recollection is that the hotel clerk, for one, came up.

Q. What is his name?

A. Well, sir, they were changing there constantly—the night clerks. I wouldn't undertake to swear who was night clerk at that time.

Q. Would you swear that the night clerk that was there at that time was present during any part of that conversation?

A. To the best of my recollection, he was; that he came in in connection with arranging Dick; making him comfortable, providing for things; we had to send for extra pillows.

Q. Any one else, can you think of?

A. I don't think of any one, excepting it is my recollection that the brakemen—one of them——

Q. Which one?

A. Well, now, I don't know whether it was McLean or Brant.

Q. Either McLean or Brant, you think was there?

A. Yes, sir; that they came in and out during the time I was there.

336 Q. And while that conversation was going on, do you think?

A. Why, naturally while it was going on, because I was talking to him about all the time I was in there, more or less.

Q. Can you name any other person that was there during any part of that conversation?

A. No, sir; I can't.

Defendant rests.

Thereupon the plaintiff introduced the following rebutting evidence on his part:

GEORGE P. WILSON, called as a witness in behalf of the plaintiff, being first duly sworn, testifies as follows:

Direct examination by THOMAS WILSON:

Q. Mr. Wilson, you have lived in Fargo how long?

A. A little over three years.

Q. You have been for a good many years an attorney and counsellor at law?

A. Yes, sir.

Q. And follow the practice of that profession?

A. Yes, sir.

Q. On Saturday of last week did you or did you not call on Mr. Rupert, who has been a witness in this case, to make inquiry of him about some facts in this case?

A. I did.

Q. Where did you find him, if at all?

A. At his office, at the round-house in this city.

Q. On last Saturday?

A. Yes, sir.

Q. Did Mr. Rupert or did he not then and there say to you, unqualified and positively, that engineer Bassett had been discharged from defendant's service as engineer for recklessness and in-

337 competency?

A. He did.

Q. Did Mr. Rupert, at the same time and place, state to you that a good many reports came in that he, Bassett, was a dangerous man and would kill somebody?

A. He did.

Q. Did he also state that at that time positively and unqualifiedly?

A. He did.

Q. Did you or did you not, at the same time and place, ask him to look up and see when Bassett was discharged?

A. I did.

Q. Did he or did he not, in pursuance of that request, look up and give you that information asked for?

A. I asked him on Monday following if he had looked up the time when Bassett was discharged, here in the court-room; and I understood him to say in September, 1881. Now, on that I couldn't be as positive as on the others; he might have said that he was suspended in September, 1881; I had but a moment's conversation with him.

Q. On Monday in the court-room he used the word suspended or discharged, you wouldn't swear positively which?

A. I would not say; no.

Q. But is there any doubt about his saying absolutely and unqualifiedly, at the time and place aforesaid, that a good many reports had come in that he (Bassett) was a dangerous man and would kill somebody?

A. There is no question about it; I remember it distinctly.

Q. Or is there the least doubt about his saying, at the same time and place, that Bassett had been discharged from the defendant's service as engineer for recklessness and incompetency?

A. No doubt at all.

Cross-examination by W. P. CLOUGH:

Q. General, you say you went up to the office of the de-
338 fendant in this case?

A. Yes, sir.

Q. You were acquainted before that time with Mr. Rupert?

A. Yes, sir.

Q. Have you stated all the conversation that occurred between you?

A. Well, not in the way he asks it. I can give it almost verbatim, Mr. Clough, very shortly.

Q. Now, I would like to hear all the conversation that occurred between you on that occasion.

A. Well, there was a little that probably wouldn't be pertinent. When I was in the office there was a call through the "phone" by Mr. McConnell, I believe, for somebody; I have seen him here—for Rossiter—and I heard the conversation; and the first thing I said to Mr. Rupert was that I didn't know but what we would want Mr. Rossiter, too. I might explain: He was at his desk, Mr. Rupert was, and after this call and answer to the "phone" I asked him—I said to him—I wanted to talk with him a moment. He brought his chair over to where I was, and the first question I asked him was this: "Can you tell me, Mr. Rupert, when engineer Bassett was discharged from the service of the company," or, "left the service of the company?" Just as Mr. Rupert stated it. He said he

could not without examining the books. Then I said to him, "Do you remember what he was discharged for?" He answered, "For recklessness and incompetency." Those were his exact words. Then I asked him, says I, "Did Mr. Fulton report him to you?" I asked that question, because in talking with our witnesses I had understood Galvin to say that he had reported this man Bassett to Fulton, and that Mr. Rupert was Fulton's superior. I asked that question whether Mr. Fulton had reported him (Bassett) to him, and his answer to that was, "So many reports came in that he was a dangerous man and would kill somebody." That was his answer to that question. Then I says, "Mr. Rupert, will you do me the kindness to examine your books and ascertain when Mr.
339 Bassett was discharged, and let me know?" And he said he would, and I bade him good day and came away, and came down and issued a subpœna for him. That was the sum total of our interview.

Q. Did Mr. Rupert know on whose behalf you made the inquiry?

A. I don't know, Mr. Clough; I have told you just—I didn't tell him I wanted to use him as a witness; I assumed that he knew about this case, and I supposed then that you folks had probably seen him. It was on Saturday afternoon, about four o'clock.

Q. And what you have stated is all that was said?

A. All that was said. I don't think there was a remark outside of what I have stated here on the stand. I don't recollect of any.

DANIEL GALVIN, recalled on behalf of the plaintiff, testifies as follows:

Direct examination by THOMAS WILSON:

Q. Mr. Galvin, after Mares was hurt and you took him up to the Headquarters Hotel, and put him on a truck, how long did you stay there?

A. A very short time. I went and got a coat that was in our room and brought it out and put it over him.

Q. Then what did you do?

A. I went to Moorhead for a doctor.

Q. Who went with you, if anybody?

A. Geo. Brant.

Q. Anybody else?

A. Yes, sir; the engineer and fireman.

Q. What engineer and fireman?

A. Bassett and his fireman; they run the engine. No other went over with us.

Q. Did you go over on the engine?

A. Yes, sir.

Q. Then, when you went over to Moorhead, Bassett and
340 his fireman, John Ryan, went?

A. They run the engine.

Q. And you and Brant, who was the other brakeman, went over with them?

A. Yes, sir.

Q. Up until the time when you went over there for that surgeon, state whether or not you were out there where Mares was.

A. I was around there; yes, sir.

Q. Were you or were you not close to where he was? State how the fact was.

A. I was until I went for the coat; yes, sir.

Q. How long were you absent for the coat?

A. Oh, probably a minute or two; just a short time.

Q. Then, after that, how long before you started over to Moorhead for the surgeon?

A. Just as soon as we could get started.

Q. Well, do you mean right off?

A. Yes, sir.

Q. And with you went the men that you speak of?

A. Yes, sir.

Q. After you went up to that place and put him on that truck there, or after you took him up to that place and before you went over to Moorhead, had or had not Bassett any conversation with him?

A. Not to my knowledge; not there; no, sir.

Q. How long were you out of sight of Mares before you went over after that surgeon?

A. Well, I went for this coat and woke Mr. Fulton up.

Q. Well, how long did that take?

A. It didn't take but a short time; not more than five minutes.

Q. While you went for the coat and woke Mr. Fulton up?

A. Yes, sir.

Q. Who did you leave with Mares, if anybody, while you
341 were away?

A. John McLean, one of my brakemen.

Q. Do you know where Bassett was while you were away for the coat?

A. I don't know; I couldn't say.

Q. But before you went over for that surgeon, so far as you know, had Bassett any conversation with him?

A. Not as far as I know; no, sir.

Q. After you came back with the surgeon, then what was done?

A. Well, we went to work.

Q. Who?

A. Me and George Brant went to work. I left McLean and told him to stay and take care of Dick.

Q. Did you have the engine with you when you were at work?

A. Yes, sir; we did.

Q. After that time was or was not Bassett with you all the time?

A. He was; yes, sir.

Q. And Brant?

A. Yes, sir; up until seven o'clock in the morning.

Q. And Bassett's fireman?

A. Yes, sir.

Q. Was that or was it not after Dick's legs had been amputated—seven o'clock in the morning?

A. I couldn't say what time they performed the amputation on his legs, but when we started to work it was before the amputation took place, and after we got done work I don't believe the amputation had took place.

Q. Well, you say you were with them at work until seven?

A. Yes, sir.

Q. Do you know whether, after that time and before the amputation took place, Bassett had any conversation with this man?

A. He did not until after seven o'clock.

342 Q. Before seven o'clock this man had been taken up to this room?

A. Yes, sir.

Q. Very well; then, if Bassett had any conversation with Mares before Mares was taken to his room it must have been while you were after that coat or waking Fulton up?

A. Yes, sir.

Q. How long was McLean left with Mares?

A. Well, I hadn't seen McLean; hadn't done any work with him after Mares was hurt at all. How long he staid with Mares I don't know. He had stayed with him until seven o'clock; how long after that I don't know; I went home.

Q. You were night man, and you went home and went to sleep?

A. Yes, sir; went to bed.

Q. Mr. Galvin, it has been stated here that at the time it is alleged Bassett ran up there carelessly that you gave him the signal to do so.

A. That's what they claim, I believe.

Q. Well, is that true?

A. He never received a signal from me.

Q. Do you know whether McLean had a lantern that night with him at the time and just previous to the time when Mares was hurt?

A. He had when he went to work. When we all went to work we all had lanterns.

Q. Do you know whether he had at the time this man was hurt or not?

A. He did. We had all our lamps there, I know. We were there together; and, as a general thing, after the men had been resting any length of time at all, after I would wake them up, the first thing they would do would be to clean their lamps or fill them with oil before they would go to work. There was times I was really delayed after they had been waked up.

Q. If you are certain he had a lamp when he went to work that night, say so.

343 A. I am.

Q. You are?

A. Yes, sir.

Q. Mr. Galvin, did you ever, at any time when you were present with Mares, hear him say, in substance or effect, that this accident was on account of his own fault?

(Objected to and withdrawn.)

Q. You say you didn't hear any such conversation as alleged between Mares and Bassett?

A. No, sir.

Q. Did you ever hear any such conversation as was alleged between Mares and Fulton?

A. No, sir; I didn't.

Q. Mr. Witness, Mr. Fulton has stated here before the jury how much he was around through that yard superintending, and so forth. Did you hear his testimony?

A. I did; yes, sir.

Q. State to this jury just about how much Mr. Fulton was accustomed to be there. State it in your own way. Make them understand, as a matter of fact, how that was.

A. Well, if he had anything to tell me that was unusual to what my custom of doing the work was he would tell me so there at the office. If he didn't see me he would leave a note to me about it. As he was going to bed from his office, he would probably drop into our office—if he had anything to tell me he would. I don't think he made a specialty of it, to stay up to see what we were doing. He wasn't around with us to see what we were doing, only in one instance, when I was short of men, he helped me one night.

Q. Do you ever remember of him helping excepting that one night?

A. No, sir; I don't.

Q. Now, can you swear or can you not swear positively as to his helping you any number of times in that yard during the
344 whole time Bassett was there—any number of times?

A. No, sir.

Q. Did he ever help you half a dozen times in that yard while Bassett was in it?

A. He didn't; no, sir.

Q. State about his coming into the yard; state when he came and how he came, and all about it.

A. Well, if he happened to be off anywhere—he roomed right here at the Headquarters Hotel—if he had anything to tell me he would tell it to me; if he hadn't he wouldn't.

Q. Did he ever pretend or did he ever, as a matter of fact, look after the manner of doing business in the yard, how the engineers or any of the men were doing it, or did he give you orders as to how you should see it done?

A. No, sir; I can't say that he did.

Q. Then he did what?

A. Stay around and tell me how it was to be done or watch the men do it; he was out around there all during the day.

Q. Around where?

A. Around the office there; from his office to the Headquarters Hotel office there, and around. If he had anything special to tell me he would tell it to me.

Cross-examination by W. P. CLOUGH:

Q. Mr. Galvin, when you took Mares up on the front of the engine to the Headquarters Hotel and took him off, whereabouts was he on the steps of the hotel?

A. He was right about opposite the waiting-room.

Q. That would be pretty near the main entrance?

A. That would be a little above the main entrance.

Q. A few feet?

A. A few feet.

345 Q. Then he was laid out there, was he, on the truck?

A. He was; yes, sir.

Q. And somebody went to the door of the hotel to get in?

A. No, sir.

Q. Nobody did?

A. The doors were wide open all hours of the night and day, too.

Q. Did somebody go into the hotel to see about getting him a place?

A. I did after I got this coat; yes, sir; I went and woke Mr. Fulton up.

Q. Where was Mr. Fulton sleeping?

A. I don't remember what room it was; it was the first flight of stairs, I believe.

Q. In the hotel?

A. Yes, sir.

Q. You first went and took him off and laid him on the truck?

A. Yes, sir.

Q. Then you went from there to the office for the coat?

A. Yes, sir; for an overcoat.

Q. In the meantime had any of the other train hands gone into the hotel?

A. Well, I couldn't say whether they went in while I went after the coat or not.

Q. Your coat was up at the office, was it?

A. It wasn't my coat; it was his own coat—the coat I went for.

Q. What office do you mean?

A. I mean our office, right above the superintendent's office.

Q. How far was that from the place where Mares was resting on the truck?

A. Well, somewhere between sixty and seventy feet.

Q. Isn't it more than a hundred?

A. I don't think it —; to the best of my belief it ain't.

346 Q. Isn't it more than one hundred and fifty?

A. Not to the best of my belief; no, sir.

Q. It's along the full length, ain't it; the remaining length of the Headquarters Hotel?

A. Yes, sir.

Q. And thirty or forty feet besides, isn't it?

A. Yes, sir; from where Mares was.

Q. Wouldn't that make nearer 150 feet than sixty or eighty?

A. Not to my best knowledge it wouldn't.

Q. Do you know the length of the front of the Headquarters Hotel?
A. I do not know, sir.
Q. Where he was was pretty close down to this end, wasn't it—pretty close to the Broadway end?
A. It was very near the centre of the building, I should judge. The ticket office and waiting-room is very near the centre of the building, I should judge.
Q. Isn't the entrance to the ticket office a good ways this side of the center, counting in the dining-room? There is the dining-room, the ladies' waiting-room, the ticket office, the gentlemen's waiting-room, and there is the space between the little building and the hotel?
A. Yes, sir.
Q. Now, you went up and got that coat?
A. Yes, sir.
Q. Do you know whether anybody had gone in to see the clerk of the hotel?
A. I don't know. During my absence they might.
Q. Somebody might have done so for all you know?
A. During my absence; yes, sir.
Q. How long do you think it took you to go up and get the coat and come back again?
A. As quick as I could go there and get the coat. It's a very short distance. Any one can have an idea of the length of
347 time it would take me. I was in a hurry, of course, under the circumstance.
Q. When you laid the coat on him did you go into the hotel?
A. I ran right upstairs.
Q. Did anybody see the clerk of the hotel?
A. I couldn't say.
Q. Was the clerk or anybody about the hotel asked to admit him before Mr. Fulton was waked up?
A. I couldn't say.
Q. You don't know about that?
A. No, sir; I couldn't say.
Q. Did you see the clerk of the hotel when you went in?
A. I couldn't say whether I did or not.
Q. There has been some testimony about the clerk of the hotel refusing to admit Mr. Mares, and Fulton was called on?
A. Mr. Fulton was the first man I went to in the hotel.
Q. In order to call Fulton you had to go into the hotel, pass through the office, and go upstairs?
A. No, sir; I didn't have to pass through the office.
Q. Well, you passed through the hall, didn't you?
A. There's a hall that leads into the ladies' room.
Q. The stairs are thirty or forty feet from the front side of the building?
A. From the outside, I should think they were.
Q. You went upstairs. How far did you have to go in the hall to find Fulton's room?
A. His room was right at the head of the stairs.

Q. Did you know where it was before you went up?
A. Yes, sir; I had been there before.
Q. Did you find him up?
A. I found him asleep.
Q. You knocked on the door, did you?
A. I woke him up; I believe his door was open.
348 Q. Did you walk in?
A. I think so; yes, sir.
Q. How long did you stay in the room?
A. Just while I told him Mr. Mares had got hurt.
Q. Did you tell him in what way?
A. I don't think I did; no, sir. I told him the wheels had run over his legs.
Q. Did you tell him what you wanted him to do?
A. I wasn't supposed to tell him what I wanted him to do.
Q. I am not asking about what you are supposed to do; I am asking what you did. What did you tell him?
A. I told him about Mares being hurt.
Q. And asked him to come down, did you?
A. I can't say as I did ask him to come down.
Q. You run down then, did you?
A. I came down; yes, sir.
Q. Where did you go after that?
A. I went to Moorhead.
Q. You found him still on the steps, did you?
A. He was still outside; yes, sir.
Q. Had he been removed to the inside of the building before you went over to Moorhead?
A. He had not, to my knowledge; no, sir.
Q. Do you remember whether he had or not?
A. Well, I wouldn't be positive; I think not. He was on the inside of the building when I got back from Moorhead. They had removed him while I was gone.
Q. Was there any more running around before you went for the surgeon?
A. No, sir.
Q. Who told you to go to Moorhead for the surgeon?
A. I don't know as any one did. Somebody might have told me.
349 Q. Did Mr. Fulton order you to go to Moorhead?
A. I don't know.
Q. He might have?
A. Yes, sir; and he might not; I wouldn't be positive whether he did or not.
Q. But when you got down there you just left at once?
A. I went as soon as I could, conveniently.
Q. About how long was it after you got downstairs before the engine started for Moorhead?
A. A very short time; not more than three or four or five minutes.
Q. And of course you don't pretend to know what happened be-

tween Bassett and Mares when you went in the first place and got the coat and brought it back, and then went upstairs and to Mr. Fulton's room and then came back downstairs?

A. I don't know what I didn't see; no, sir; and didn't hear.

Q. I understood you to say after you got back you didn't go up again until after seven o'clock?

A. Not until after I was through work.

Q. You went out and got a surgeon and brought him over and then went to work in the yard, and did not go back until after you quit work?

A. Until after I quit work in the morning, if I did then.

Q. Did you see Fulton around there before you went to Moorhead?

A. No, sir; I did afterwards.

Q. After you got back from getting the surgeon you saw Fulton there?

A. Yes, sir; he was there.

Q. When you went to see him in the morning after you got through your work had the amputation then been performed?

A. I couldn't say whether it had or hadn't. I wasn't upstairs.

Q. I understood you to say after you quit your work you called on him again?

350 A. No, sir; I never called up there but once after that.

Q. You speak about Mr. Fulton's relation to the yard?

A. Yes, sir.

Q. All of this yard work was under charge of Mr. Fulton, wasn't it?

A. Well, I suppose so. I had full charge of the night yard.

Q. Your charge was under Mr. Fulton, wasn't it?

A. Well, to a certain extent it was.

Q. Didn't you take your orders from Mr. Fulton?

A. I did; I took my orders from Mr. Fulton and had full charge of the yard during the night.

Q. That is, you had charge, but Mr. Fulton was your superior?

A. Yes, sir.

Q. Was in charge of affairs at the same time?

A. Yes, sir.

Q. And the day gang took their orders from him, didn't they?

A. Yes, sir; I obeyed orders from Mr. McCabe as well as Mr. Fulton.

Q. Wasn't Fulton frequently about the yard to see whether his orders or instructions were carried out and to give orders and instructions?

A. Not to my knowledge; he wasn't there for that purpose.

Q. Didn't he come into the yard frequently?

A. I saw him frequently evenings.

Q. Around the yards?

A. Not around the yards unless there was something special he wanted done.

Q. He was out with the yard gangs, was he; around the yard daytimes?

A. He was there, I suppose. I slept daytimes.
Q. You were around daytimes some?
A. Oh, yes; I would come around probably a short time
351 before it was time to go to work.
Q. When you were out near there daytimes you saw Fulton around?
A. I didn't look for him. I worked nights.

Redirect examination by THOMAS WILSON:

Q. Was there a yardmaster who had general control day and night above you and under Fulton at that time?
A. No, sir; Fulton was the man.
Q. Well, wasn't there a yardmaster?
A. I was.
Q. You were night yardmaster; who was the day yardmaster?
A. Baker was the day yardmaster.
Q. I think you answered before as to whether you ever heard any such conversation between Fulton and Mares as Fulton has testified to?
A. I didn't hear any conversation between them; no, sir.
Q. I will now ask a question which I have before asked, whether you ever heard between Mr. Mares and any one any remark made by Mr. Mares that he was to blame for this, or that he stepped off the car or any other statement by Mares different from what he has testified to in this case concerning the cause of this accident?

(The defendant objects to this question on the ground that it is incompetent and immaterial, which objections are sustained by the court, to which ruling the plaintiff duly excepts.)

Recross-examination by W. P. CLOUGH:

Q. You are perfectly certain that you are the man that went and aroused Mr. Fulton, are you, at that time?
A. I am; yes, sir; I know it.

JOHN MCLEAN, recalled as a witness in behalf — the plaintiff, testifies as follows:

352 Direct examination by THOMAS WILSON:

Q. Mr. McLean, after the injury to Mares that night were you present until he was taken up to the hotel and left on the truck at the hotel?
A. I was, all the time; yes, sir.
Q. When he was left on the truck at the hotel and up until the time that he was taken to his room were you or were you not present?
A. I was present all the time with him.
Q. All the time?
A. Yes, sir.
Q. Let me ask you whether you were left to take charge of him by Bassett, the yardmaster?

A. I was left by Mr. Galvin.
Q. By Galvin, I mean.
A. Yes, sir.
Q. You were left to take charge of Mares?
A. Yes, sir.
Q. And you state you were with Mares all the time, from the time he was hurt until he was taken up to his room in the Headquarters Hotel?
A. I was; yes, sir.
Q. Were you present so as to have heard any conversation had with him during that time—so that you could have heard any conversation had with him during that time?
A. Yes, sir; I was.
Q. What do you say?
A. I was right by him all the time—standing by the truck—while he was outside.
Q. Did you hear any such conversation as Mr. Bassett has sworn to here to having had with Mr. Mares while he was on that truck at the Headquarters Hotel before he was taken to his room?
A. Not to my recollection I didn't.
353 Q. You say, to your recollection, you didn't hear any such thing?
A. I didn't hear any.
Q. Were you present at the time, immediately after he was hurt, when he stated what was the cause of his injury?
A. Yes, sir.
Q. Now, if Mr. Mares had stated any such thing as that it was his own fault or his own negligence, do you think that you would recollect it?
A. I would; yes, sir.
Q. You say you would?
A. Yes, sir; I would?
Q. Now, according to your recollection, did he ever make any such remark as that outside during that time?
A. Not in my hearing he didn't.
Q. And you state you were present all the time from the time he was taken to the Headquarters Hotel until he was taken to his room?
A. Yes, sir.
Q. Mr. McLean, after he was taken to his room were you still left with him?
A. I was still in his room to take care of him; yes, sir.
Q. How long did you remain to take care of him?
A. I remained, if I remember right, until half past ten or eleven o'clock that day.
Q. Did you assist in taking him up into the room?
A. Yes, sir; I did.
Q. Well, were you present to-day when Mr. Fulton testified as to the conversation he had with Mr. Mares before Mares' legs were amputated?
A. I believe I was.

Q. Until the time Mares' legs were amputated were you or were you not present with Mares?

A. I was.

354 Q. Were you all the time after he was hurt up until after the amputation?

A. I was, until after it; yes, sir.

Q. Were you there during the amputation?

A. Yes, sir; all the time.

Q. And assisted in that?

A. I did; yes sir.

Q. Mr. McLean, did you or did you not hear any such conversation as Mr. Fulton says here he had with Mares at that time between those persons?

A. I did not, sir; didn't hear anything of the kind.

Q. Had there been any such conversation would you have heard it?

A. I would have heard it; yes, sir.

Q. You say you heard no such conversation?

A. I heard no such conversation as that. I heard him ask him if he was in much pain. I remember of Mr. Fulton being in the room once and asked him if he was in much pain. He said, "No; not at present." He was very sick at the stomach. That is all the conversation I heard.

Q. Well, do you remember of him being in Mares' room at all afterwards until after the amputation?

A. That is the only time I saw him in. After the amputation I was not in the room steady myself.

Q. After the amputation you were not steadily there?

A. No, sir.

Q. By the way, had you a lantern with you that night?

A. I had.

Q. Had you or had you not a lantern with you at the time Mares was hurt?

A. I had.

Q. Was it or was it not lighted?

A. It was lighted. I had it in my left hand.

355 (The plaintiff offers to prove by this witness that during the time he was present with Mares he did not hear Mares say to the persons named, or to any other persons, that he, Mares, was to blame and fell off the cars on account of his own fault or negligence, or anything to that effect, and that if any such thing had been said in his presence he would have noticed it, and that it would have attracted his attention; which offer is objected to by the defendant upon the ground that it is immaterial and incompetent, which objections are sustained by the court, to which ruling the plaintiff duly excepts.)

Cross-examination by W. P. CLOUGH:

Q. Mr. McLean, what time was that amputation made in the morning?

A. Well, I don't rightly remember. I say I don't rightly remember what time. I think about—it was got through with, I think, about eight o'clock; some time after breakfast.

Q. Do you remember what surgeon it was performed the amputation?

A. Dr. Darrow was one, and if I remember rightly Dr. Lewis, from Moorhead, was another one. I think there were three or four. They were the two principal ones—Dr. Darrow and Dr. Lewis. I won't be sure whether it's Lewis or not; I think it is.

Q. Now, the engine was sent over to get Dr. Lewis, was it?

A. I believe it was; yes, sir.

Q. Who called Dr. Darrow?

A. I couldn't tell.

Q. Did you go after him?

A. No, sir.

Q. You swear to that positively, do you?

A. I swear to that. I didn't go for him.

Q. Who got this other doctor?

A. Well, some of the other men; I couldn't say who.

Q. From the time you took Mr. Mares and put him in bed
356 until the amputation occurred, how long was it?

A. It was a good while; the doctors wouldn't do anything with lamp or gas light; I forget whether it was gas or a lamp they had; they wouldn't do anything with lamp-light; they waited until they had daylight to do it with.

Q. Did they wait until broad daylight?

A. Well, I don't remember rightly now whether they did or not; I wouldn't be certain.

Q. After you had got Mr. Mares up and had got him in bed how long a time elapsed before the amputation took place?

A. Well, I couldn't be positive now; I don't recollect rightly; quite awhile; an hour and a half, probably, or probably more.

Q. Who was up in the room during that hour and a half?

A. I saw Mr. Fulton once, and, I think, Mr. Hobart's clerk, if I remember right, was in another one.

Q. Who was that—Mr. Trimball?

A. I didn't know his name; I knew him by sight, though.

Q. And who else?

A. Well, there was the night clerk in the hotel, and I didn't know his name—of course, I knew he was night clerk—and a good many railroad boys—that is, on the road.

Q. When you first brought Mr. Mares up did you help to lift him on the truck in front of the hotel?

A. Yes, sir; I helped to lift him in every shape until he was undressed.

Q. Whereabouts was that truck lying on the hotel steps?

A. I couldn't say exactly what part of the house, but very high; I think half way up—hardly half way up—from this end of the hotel towards the railway officials' office.

Q. Was it in front of any of the doors of the hotel?

A. Well, I wouldn't be certain, but I think it's likely it would be.

Q. You don't remember just where it was, in reference to
357 the doors of the hotel?

A. No, sir; I wouldn't be certain. I think it would be opposite the doors, about where I said; about the center of the platform; I think it would be somewheres in about that restaurant or ticket office; somewheres into there, I should think it was.

Q. How soon after you got there was an effort made to get him into the house?

A. Right away, I think; a very short while.

Q. Did somebody go in and see the night clerk about getting him in there?

A. Yes, sir; somebody did; I don't remember who it was.

Q. Wasn't that you?

A. No, sir; it wasn't me.

Q. Was it Mr. Galvin?

A. I won't be certain whether it was Mr. Galvin or not.

Q. Mr. Galvin testifies it wasn't he.

A. I don't know whether it was or not; I would not be sure.

Q. Was the clerk first applied to to get him in?

A. Well, he wouldn't give us a room.

Q. How do you know he wouldn't; who was it went in; some one must have gone in?

A. Some one must have gone in.

Q. It wasn't Bassett, was it?

A. I wouldn't be certain.

Q. What do you think about it, whether it was Bassett or not?

A. I don't remember who it was went in; I ain't prepared to tell.

Q. Who was the other man that was with you?

A. George Brant.

Q. Was it Brant went in?

A. I couldn't tell; I was alone at the truck with Dick.

Q. Wasn't Bassett there with you?

A. Yes, sir; we had all been there until we got him into the house.

358 Q. Now, wasn't there considerable running around in regard to getting him into the house and getting him taken care of?

A. There was. I didn't do any of it myself.

Q. Didn't you?

A. I stayed there at his request and at the request of Mr. Galvin.

Q. Parties were generally flying around trying to get him into the house——

A. As far as I remember.

Q. Getting him into the house, going for the doctors, and trying to make him comfortable required a good deal of flying around from all of you?

A. I presume it did; yes, sir.

Q. Isn't it true you were all engaged in that?

A. I guess they might have —; yes, sir.

Q. Mightn't you have gone for something, too?

A. No; I know I didn't.

Q. Will you swear positively that you didn't leave him; that you stood right by him all the time?

A. Yes, sir; that was Mr. Galvin's orders. As soon as we took him off from the engine he asked Mr. Galvin for one of us to stay with him. Mr. Galvin says, "McLean, you had better stay with him."

Q. Did he give you any further orders?

A. No further orders I remember of.

Q. Where did you first see Mr. Fulton?

A. Where I remember of seeing him first was in his room, after we got a room for him; if I remember right it was Mr. Fulton got the room from the clerk.

Q. Did he come out and tell you when the room was gotten, or did the clerk come out?

A. I ain't certain; I think it was the clerk; the clerk showed us the way up the stairs.

Q. Wasn't Mr. Fulton right there with you at that time?

359 A. I don't remember; there was quite a number of folks around.

Q. A bed was gotten ready when you went upstairs, wasn't it?

A. Yes, sir; they were getting one ready—changing the clothes on it, I guess.

Q. Who carried this man upstairs?

A. I was one helped carry him up.

Q. What did you carry him on?

A. On a kind of a door or little platform, if I remember right.

Q. You had something to carry him on?

A. Yes, sir.

Q. You don't remember what it was?

A. No, sir; I don't remember what it was.

Q. You didn't lay him down on the bare truck, did you?

A. I forget now; didn't carry him upstairs on the truck, I don't think.

Q. When you laid him down you didn't lay him down on the bare timbers of the truck in his wounded condition?

A. I don't remember that.

Q. The truck was merely a frame; hadn't any close bottom or bed?

A. It was a truck like you see in the depot.

Q. Those trucks are frames without close board bottoms?

A. Yes, sir; not very close.

Q. So it would be very uncomfortable for a man to lie upon it without anything under him?

A. Yes, sir; I suppose it would.

Q. Who went for and got whatever was put on that truck for him to lie on?

A. Mr. Galvin got a coat.

Q. That was to put on top of him, wasn't it?

A. I don't know whether it was to put on top of him or on the bottom of the truck.

Q. You heard Mr. Galvin's testimony as to the coat; who
360 went for and got whatever was got to make him comfortable; might you not have done it yourself?

A. I am sure I didn't, though.

Q. You are positive of that, are you?

A. Yes, sir.

Q. When he was carried upstairs who undressed him?

A. I think Dr. Darrow and myself.

Q. Was Dr. Darrow there as soon as you got ready to take him upstairs?

A. I don't remember. I don't think he was.

Q. Who went and got Dr. Darrow?

A. I don't know who got Dr. Darrow.

Q. You didn't go and get him yourself, you say?

A. No; I didn't get him myself.

Q. Didn't Brant go and get him?

A. I don't remember.

Q. Can you tell me now how long he was taken upstairs before Darrow got there to help undress him?

A. Well, not only a short while, I think.

Q. Well, about how many minutes?

A. Well, probably five or ten minutes.

Q. Where was his room in the hotel?

A. His room was on the first flight of stairs; I can't remember rightly now; I could go to the room; I couldn't tell the number of it now.

Q. How was it with reference to the head of the stairs? Was it back of the head of the stairs? Did it face north, or where?

A. Yes, it faced north; that way from the head of the stairs, if I remember right.

Q. After Darrow had got there the bed had been prepared and he had been put in and was undressed. Did Dr. Darrow go away again before the amputation?

361 A. Well, I remember of him being sitting in the hall talking with the other doctors.

Q. Do you remember whether the engine had got back from Moorhead with Dr. Lewis before Dr. Darrow came?

A. I think Dr. Darrow was there when they came back.

Q. Wasn't it some one of your party that went and got Dr. Darrow?

A. I don't know who brought Dr. Darrow. It was Galvin and Brant, I guess, went after Dr. Lewis.

Q. After you had got him in bed was it necessary to go out of the room for anything to make him comfortable?

A. Yes, sir.

Q. Who did that work?

A. I went out once myself down to the kitchen in the hotel.

Q. What time was that?

A. It was at the same time they commenced to operate on him.

Q. It was before the amputation, was it?

A. Yes, sir; a few minutes, I think. I went for a cloth and some water.

Q. Was it necessary, previous to that time, to go for anything?

A. No; not that I remember of.

Q. Who were present that time when you went out for cloths and water?

A. Dr. Darrow and this Dr. Lewis. I ain't positive about it being Dr. Lewis, but I think it is. I know the man when I see him. I ain't certain that is his name.

Q. Will you swear you were not out of that room that morning except to go and get those cloths?

A. That's the only time I remember.

Q. You simply say you don't remember of any other time?

A. No, sir; I don't remember any other time.

Q. You don't mean to swear positively you were not out?

A. No, sir; I don't mean to swear to that.

362 Redirect examination by THOMAS WILSON:

Q. When you went to get the cloths and water that was preparatory to making the amputation—just as they were about to commence it?

A. Yes, sir.

RICHARD MARES, recalled as a witness in his own behalf, testifies as follows:

Direct examination by THOMAS WILSON:

Q. Mr. Mares, you were present in the court-room and heard the testimony of Mr. Bassett, were you not?

A. Yes, sir.

Q. Did you hear his testimony as to your admission to him that it was your own fault falling off that car?

A. Yes, sir.

Q. Did you hear what he said about that?

A. Yes, sir.

Q. Did you ever have any such conversation with him?

A. I did not.

Q. Any time or place?

A. No, sir.

Q. Did you ever say to any one in the world anything to that effect?

A. I did not.

Q. Do you remember of ever having any conversation with Mr. Bassett at all during the time you were on that platform or up there at the time before you were taken to your room?

A. I do not.

Q. Well, was your mind clear all that time?

A. It was; yes, sir.

Q. Up until they commenced to operate on you?

A. Yes, sir.

Q. Well, you remember of being taken up to your room?

363 A. Yes, sir.

Q. By the way, you may state who was left with you—how you were—what the state of the case was up until you were taken to your room.

A. After they had lain me on the truck they took the cushions out of the engine, the seat of the engine, and laid — on the truck, I think; at least they placed one of the cushions at my back on the truck and Mr. McLean stood there by the side of me and kind of supported me on the truck. After they had lain me on the truck the night clerk came out there—I don't know whether any one was sent after him, whether any one went in or not—and he said that they couldn't take me in; that he couldn't let me in without having orders from the proprietor—seeing him first. He said they would have to take me down in some building back of that. I don't know just where the building is; all I know about the building was what I heard the boys stating that there was a man——

Q. Now, then, you stayed there about how long, do you remember, on that platform and on that truck, Mr. Mares?

A. Well, somewheres in the neighborhood of half an hour, I should judge; perhaps not quite as long, maybe a little longer.

Q. How long did Mr. Galvin stay there?

A. Well, he was there some little time—that is, quite a few minutes.

Q. But you don't remember just how long?

A. I don't remember how long.

Q. Who, if anybody, staid with you?

A. Mr. McLean.

Q. How long did Mr. McLean stay with you?

A. He stayed with me until I was taken into the room.

Q. Did he or did he not stay with you any longer than that?

A. A. He did; yes, sir.

Q. Until when?

A. Until—well, as long as I know anything about it—until

364 I was under the influence of ether.

Q. For awhile you ceased to know anything?

A. Yes, sir; for awhile I was under the influence of ether.

Q. Now, if there was anything of any such conversation as Bassett narrates—if there was anything about any such conversation—just state whether there was anything of it, or whether there was literally nothing of it.

A. There was nothing, to my knowledge?

Q. Well, you have stated that your mind was clear; that you remember what occurred during that time?

A. Yes, sir.

Q. Did you ever to Mr. Bassett make any such statement at any time or at any place?

A. I never did.

Q. Now, then, you were present and heard the statement of Mr. Fulton?

A. Yes, sir.

Q. Go on and tell us about that; did you ever make that statement to him?

A. I never did; no, sir.

Q. You remember the time that he states you made it?

A. Yes, sir.

Q. Now, Mr. Mares, did you have a conversatian with him at any time in which there was anything said—I mean after that injury—in which there was anything said by you about Bassett neglecting to receive signals and you had to repeat them over and over again?

A. I do; yes, sir.

Q. When was that conversation had with him and what was it?

A. Well, I couldn't exactly remember the day; it was, I think, some three or four days after I was hurt.

Q. State what that conversation was.

A. Mr. Fulton was talking to me about how I come to get
365 hurt and so on, having a general talk about it, and I told him, as I have told the jury here, that I considered it Bassett's fault, and we were speaking about Bassett in one way or another; I told him that he never had obeyed signals properly. I spoke in this way, that a man would have to give him a signal three or four times before he would pay any attention to it.

Q. Do you know how any of those doctors were sent for, Mares?

A. Yes, sir.

Q. Well, how do you know; what do you know?

A. Well, the night clerk said he would go in and telephone for Dr. Darrow.

Q. How do you know?

A. I heard him say so. I don't know that he did telephone for him; I heard him say that he would.

Cross-examination by W. P. CLOUGH:

Q. Mr. Mares, while you were lying on this truck, were you lying on the bare frame of the truck?

A. I think not; no, sir.

Q. What were you lying on?

A. I think I was lying on a cushion.

Q. What sort of a cushion?

A. The cushion to the seat upon the engine.

Q. After you had been hurt you were picked up and one of the engine cushions taken out and you put onto that; is that it?

A. I don't remember whether the cushion was put under me at the time I was picked up and placed onto the engine before I was taken up to the Headquarters, or whether it was taken out of the engine afterwards. There was one cushion taken out of the engine afterwards, after I was placed on the truck and they had taken me back.

Q. You can't swear whether any cushion was taken out previous to that or not?

366 A. No, sir.

Q. When you got up there and were placed on the truck you were perfectly conscious of what was going on?

A. Yes.
Q. Around there?
A. Yes.
Q. If you made any statement to Mr. Bassett on that occasion as to how you got hurt, was that statement true?
A. Yes, sir.
Q. If you did make any statement?
A. Yes, sir.
Q. When did you see Mr. Fulton?
A. I saw Mr. Fulton—I think it was soon after he came downstairs.
Q. And before you were taken upstairs?
A. Yes, sir.
Q. Do you remember who helped to carry you upstairs?
A. I remember part of them.
Q. Who were they?
A. Mr. McLean was one, the night clerk was one—Mr. Bliss, I believe is his name—and the porter; I don't remember his name.
Q. I think you say while you were lying there the hotel clerk came out and said he couldn't admit you without the consent of the proprietor.
A. Yes, sir; I believe so.
Q. Do you know how the clerk happened to come out and speak to you about that?
A. No, sir; I do not. He didn't speak to me.
Q. I mean to the party?
A. I do not; no, sir.
Q. Do you know whether some member of the party hadn't gone in and asked him for admission?
A. I do not know, sir.
Q. You don't remember whether that was done or not?
367 A. No, sir; I do not.
Q. There was nothing unusual about an engine halting in front of the house at any time of night?
A. No, sir; nothing.
Q. That wouldn't probably called him out there, would it?
A. No, sir.
Q. Can you recollect whether any of the party went in or was sent in to call out the night clerk?
A. I cannot; no, sir; there was quite a number around there.
Q. And you were carried upstairs, and you were undressed, were you not?
A. Partially; yes, sir.
Q. And placed in bed?
A. Yes, sir; I was laid on the bed.
Q. Did you see Mr. Fulton around there?
A. I did; yes, sir.
Q. Did you see him in your room that morning before the amputation?
A. I did; yes, sir.
Q. You had known Mr. Fulton before, hadn't you?

A. I had.
Q. He hired you, didn't he?
A. He did.
Q. You had met him almost daily while you were at work, hadn't you?
A. Yes, sir.
Q. He was your superior officer, wasn't he?
A. In one respect; yes, sir.
Q. He had hired you before when you were at work for the company and hired you this time?
A. Yes, sir; or rather he was the man that hired me. I wasn't at work under him.
368 Q. Well, in one sense, you were at work under him; he was at the head of all of them here at the station?
A. Yes, sir.
Q. Do you remember how long he stayed in your room before the amputation?
A. I do not; no, sir.
Q. About what time did that amputation occur?
A. Well, it was some time after daylight; I don't remember just the hour.
Q. Will you swear you had no conversation with Mr. Fulton that morning in your room at all? Do you mean to have it understood you had no conversation with him at all that morning?
A. No, sir; I did not.
Q. You did have conversation with him?
A. I think there was some; a few words spoken; yes, sir.
Q. You were conscious at that time, were you?
A. Yes, sir.
Q. If you made any statement to him at that time as to how you were hurt, was that true?
A. Yes, sir.

Plaintiff rests.

Thereupon, after the plaintiff rested, the defendant introduced in its behalf, by permission of the court, the following testimony:

S. G. FULTON, recalled as a witness in behalf of the defendant, testifies as follows:

Q. Mr. Fulton, the attention of Mr. Mares, when he was on the stand recently, was called to the conversation with him on the morning after he was hurt, in the room of the hotel, that you testified to this morning. Mr. Mares denied that conversation, but said that on a subsequent day he had another conversation with you, in which he stated that the engineer was to blame for his hurt—
369 Bassett—and that he had to give the engineer three or four signals before he would obey them. Now, I will ask you if there was any such subsequent conversation in which he made that statement to you, that the engineer was to blame, and that he had to give him three or four signals?

A. There was no subsequent conversation in which he retracted anything.

Q. Whether he stated the engineer was in fault?

A. I was going on to say that there was no subsequent conversation that was in any respect any different from the one that was testified to by me on the morning after his injury.

Defendant rests.

Defendant's Motion to Dismiss.

Thereupon the defendant, by its counsel, at the close of all the testimony, demurred to the evidence, and the whole of it, adduced and interposed in said action, and then and there requested the court to dismiss said action upon the following grounds:

First. Because the evidence shows clearly and fully that the plaintiff has contributed to the injury complained of.

Second. Because the evidence fails to show that the defendant is guilty of any negligence by or on account of which the plaintiff sustained the injury of which he complains.

Third. Because the evidence fails to show that the defendant has not used ordinary care in the selection of the engineer, Bassett, through whose negligence it is alleged the plaintiff sustained this injury in question.

Fourth. Because the evidence clearly and conclusively shows that the plaintiff not only had the means of knowing, but actually did know, of the character of the engineer, Bassett, of whom he
370 complains, and of his fitness for that employment, and that he made no complaint of Bassett or of his unfitness to his superior officers, but continued, having such knowledge and the means of knowledge, in the employ of the company in connection with said Bassett, who was then and there a fellow-servant.

Which demurrer and motion to dismiss were then and there overruled by the court; to which ruling the defendant, by its counsel, then and there duly excepted.

Instructions of Defendant Refused.

The defendant then and there, by its counsel, requested the court to give to the jury the following instruction in its behalf:

"The jury are hereby instructed and directed to find for the defendant;" which request to give said instruction the court then and there refused and then and there endorsed his refusal upon said instruction; to which ruling the defendant, by its counsel, did then and there duly except.

The defendant, by its counsel, thereupon requested the court to give to the jury the following instruction:

"If the plaintiff knew or had the opportunity of knowing, before his fall from the car in question, that Bassett was an unfit or unsafe man to run the engine in question, in that case it was the plaintiff's duty to refuse to work with him any longer, and his failure to do so would prevent him from recovering in this suit;" which request to

give said instructions the court then and there refused and then and there endorsed his refusal upon said instruction; to which ruling the defendant, by its counsel did then and there duly except.

The defendant, by its counsel, thereupon requested the court to give to the jury the following instruction:

"The evidence adduced on behalf of the plaintiff tended to
371 show that Bassett was guilty of negligence in running his engine during the same night on which the plaintiff was hurt, previous to the accident and while the plaintiff was working with him. If the jury believe such to have been the fact, it must find for the defendant;" which request to give said instruction the court then and there refused and then and there endorsed his refusal upon said instruction, to which ruling the defendant, by its counsel, did then and there duly except.

The defendant, by its counsel, thereupon requested the court to give the jury the following instruction: "The jury should find for the defendant in this suit;" which request to give said instruction the court then and there refused, and then and there endorsed his refusal upon said instructions; to which ruling the defendant, by its counsel did then and there duly except.

Instructions Given at Defendant's Request.

The court thereupon gave the jury the following instructions at the request of defendant's counsel:

"In order to recover in this suit, the plaintiff must have established the following propositions, to wit: 1. That the plaintiff was hurt through the negligence or improper conduct of Arthur D. Bassett. 2. That the defendant neglected to use ordinary care in the selection of Bassett as the employee for running the switch-engine mentioned in the evidence. 3. That the plaintiff was free from negligence on his part which contributed to the injury."

"If the jury believe that the plaintiff failed to use due care under all the circumstances in conducting himself while standing on top of the car referred to in the evidence, and that such want of care on his part contributed to produce his fall from the car, then the jury must find for the defendant."

"If the jury believe that the plaintiff failed to use due care, under all the circumstances, in conducting himself while standing
372 on the car referred to in the evidence, and that such want of care on his part contributed to produce his fall from the car, in such case the jury must find for the defendant, although it is of opinion that Bassett was an unfit person to run the engine in question and was guilty of actual negligence in running it on this occasion."

"In order to charge the defendant in this suit on the ground of Bassett having been an unfit man to run the engine in question the unfitness must have been of a nature tending to make working with him and his engine unusually perilous."

Instructions Given at Plaintiff's Request.

The court thereupon, at the request of plaintiff's counsel, instructed the jury as follows:

"This plaintiff, when he voluntarily entered into the employ of the defendant, took the risk of dangers ordinarily attending or incident to the business in which he was employed, including the perils arising from carelessness of his fellow-servants."

To the above and foregoing the defendant, by its counsel, did then and there duly except.

The court thereupon, at the request of plaintiff's counsel, instructed the jury as follows:

"But the above rule is subject to the following limitation or exception, viz: That the master or employer, whether a natural person or a corporate body, is legally bound to use due care not to expose the servant, when conducting the master's business, to perils or hazards against which he may be guarded by proper diligence upon the part of the master."

To the above and foregoing the defendant, by its counsel, did then and there duly except.

The court thereupon, at the request of plaintiff's counsel, instructed the jury as follows:

373 "That in this case, while the defendant did not guarantee to its servants or to this plaintiff that the engineer on the switch-engine in its yard at Fargo should be careful or skillful or competent, yet it was bound to exercise proper care to get a person in all respects fit for the place, and if after defendant had employed such engineer it learned or had reason to believe that he was careless, reckless, or incompetent, it was its duty to discharge him."

To the above and foregoing the defendant, by its counsel, did then and there duly except.

The court thereupon, at the request of plaintiff's counsel, instructed the jury as follows:

"That if the defendant was careless either in employing or retaining in its service a reckless, incompetent, or careless engineer on said engine, and on account of the recklessness, incompetence, or carelessness of such engineer the plaintiff was injured without fault or negligence on his part, then in such case the railroad company is liable to him for the damage resulting from such injury."

To the above and foregoing the defendant, by its counsel, did then and there duly except.

The court thereupon, at the request of theplaintiff's counsel, instructed the jury as follows:

"That sound sense and public policy require that railroad companies should not be exempt from liability to their employees for injuries resulting from the incompetency, negligence, or carelessness of co-employees when by the exercise of proper diligence such injuries might be avoided."

To the above and foregoing the defendant, by its counsel, did then and there duly except.

The court thereupon, at the request of the plaintiff's counsel, instructed the jury as follows:

"That the plaintiff had a right to suppose and assume that
374 the railroad company had used proper diligence and care in the employment and retention of an engineer."

The court thereupon, at the request of plaintiff's counsel, instructed the jury as follows:

"That what will amount to proper care and diligence in the selection of a servant for a particular duty or in the rentention of such servant will in part depend on the character and responsibility of that duty which said servant is to perform. The greater the danger from the negligence, incompetence, or carelessness the greater the care should be in his selection or retention; for instance, the same degree of diligence or care which is required in the employment of a locomotive engineer would not be required in the employment of a fireman."

To the above and foregoing the defendant, by its counsel, did then and there duly except.

The court thereupon, at the request of plaintiff's counsel, instructed the jury as follows:

"If Bassett, the engineer in the yard at Fargo, was careless, reckless, or incompetent, and if such carelessness, incompetency, or recklessness caused the injury to the plaintiff, then if the agents or servants of this defendant whose duty it was at that time to employ and discharge him if unfit did not exercise due care in the employment of Bassett, or if after he was employed they in fact knew that he was careless, reckless, or incompetent, or if by the exercise of due care they would have discovered that he was careless, reckless, or incompetent, then the railroad company is liable to the plaintiff for any injury he may have suffered from such carelessness, recklessness, or incompetency of Bassett if the plaintiff himself was not guilty of any negligence which contributed to that injury."

To the above and foregoing the defendant, by its counsel, did then and there duly except.

The court thereupon, at the request of plaintiff's counsel,
375 instructed the jury as follows:

"Ordinary care or due care in such cases is not merely such care as other railroad companies exercise under like circumstances, for other railroad companies may be careless. Ordinary care in the selection or retention of servants in such cases implies that degree of diligence and precaution which the exigencies of the particular service reasonably require—that is, such care as in view of the consequences that may result from negligence on the part of employees is fairly commensurate with the perils or dangers likely to be encountered."

To the above and foregoing the defendant, by its counsel, did then and there duly except.

The court thereupon, at the request of plaintiff's counsel, instructed the jury as follows:

"The jury have not legally a right to find that the plaintiff Mares was guilty of negligence which contributed to his injury unless the jury finds that that fact is shown by a preponderance of evidence."

To the above and foregoing the defendant, by its counsel, did then and there duly except.

Judge's Charge to the Jury.

Thereupon the court, of its own motion, charged the jury as follows:

GENTLEMEN OF THE JURY: After listening to the evidence that has been presented to you in this case and the arguments of counsel the duty now devolves upon you to decide, after a careful consideration of that evidence, the question whether this plaintiff is entitled to recover; and, if so, what amount he ought to recover, and I now desire to direct your minds to the real issues in this contention and state some of the principles of law that must govern you in passing upon those issues.

It is not denied that the plaintiff, in the month of October,
376 1881, was in the employ of the defendant, a railroad corporation, as brakeman in the yard at Fargo, and that he was injured by being run over by the cars of the defendant being operated at the time by the engineer and other employees of the defendant. Then the fact of the injury at the time and place and in the manner alleged being conceded, the first and all important question is: Was the defendant, the railroad company, in fault or guilty of such negligence and which caused the injury as makes it liable to the plaintiff for the damages sustained by him.

This plaintiff was in the employ of defendant and was injured by being run over by cars operated and run by another employee of the defendant, and it is claimed that it was the carelessness of the latter that caused the injury.

The law relating to the liability of an employer to one of his employees for damages sustained by him resulting from the carelessness or negligence of another employee engaged in the same general business is pretty clearly defined.

The employer is not liable for damages sustained by one employee caused by the negligence of another employee engaged in the same general business unless the employer is guilty of negligence from which the injury resulted, and it is held that he who engages in the employment of another for the performance of specific duties and services for compensation takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and in legal contemplation the compensation is adjusted accordingly. These are perils which the servant is likely to know and against which he can as effectually guard as the employer; they are perils incident to the services and which can be as distinctly foreseen and provided for in the rate of compensation as any other.

The business of a brakeman upon a train is a perilous occupation,

and he takes the risk when he engages as such of all the ordinary perils of such employment.

But the employer must not expose his employee when con-
377 ducting his business to perils or hazards against which he may be guarded by proper diligence upon the part of the employer.

While it is implied in the contract of hire between the parties that the employee risks the dangers which ordinarily attend on or are incident to the business in which he voluntarily engages for compensation, it is equally implied in the same contract that the employer shall supply the physical means and agencies for the conduct of his business; he should be guilty of no negligence or want of care in that regard.

The duties and liabilities of employer and employee to each other are defined by the code or statute of this Territory which must control this case as follows: "An employer is not bound to indemnify his employee for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, or in consequence of the negligence of another person employed by the same employer in the same general business, unless he has neglected to use ordinary care in the selection of the culpable employee."

This, gentlemen, you will discover, brings us to the vital or pivotal point in the case: First. Was this accident caused by the carelessness or recklessness of this engineer in the employ of the company; and, if so, did the defendant neglect to use ordinary care in the selection of this engineer? Was the plaintiff guilty of negligence which contributed to the injury? To these three propositions I invite your serious consideration of the evidence presented.

The ground on which the law recognizes liability on the part of the defendant is that which arises from personal neglect of the use of ordinary care in the selection or in continuing in its service an engineer to run this switch-engine.

We are not now dealing with the liability which a railroad corporation assumes in respect to the safety and security of passengers transported over its road for a compensation and in regard to which it becomes an absolute insurer against all defects which the highest degree of vigilance could detect or provide against, but with
378 a case of neglect by the defendant of the use of ordinary care in the selection of a competent engineer.

But, gentlemen, if you find from the evidence that the defendant company was guilty of negligence in not providing a safe and fit man to run that engine, in consequence of which you also find the accident occurred, still, if the plaintiff failed to exercise that prudence, care, and caution which a prudent man under similar circumstances ordinarily would exercise, which contributed to the injury, he is not entitled to recover.

But this negligence on the part of the plaintiff which would preclude his recovery of damages must be the actual proximate cause or contributing to some extent directly to the injury, and not a mere technical wrong or neglect, contributing either incidentally or remotely or not at all toward it, or if he could have by ordinary care

and caution avoided the injury and failed to exercise it he cannot recover in this action.

It is also true that if the plaintiff had full knowledge of the reckless and careless habits of the engineer Bassett, as complained of by him, or had reason to know of such recklessness and carelessness, he should either have quit the service or reported the facts to the officers of the company having the power to discharge him, and a failure to do so might be negligence on his part; but, gentlemen, it is for you to say, from all the attending circumstances, whether he was neglectful in that regard.

While this rule of law above stated is generally true a reasonable view must be taken in its application here. The evidence tends to show that this plaintiff had been at work in this yard but a short time and only a part of that time with or under this engineer, Bassett. Now, had he such knowledge or had he such an opportunity to know of the careless and reckless habits of Bassett that rendered it dangerous for him to work with him and made it his duty to have refused to continue in such service or have reported him to the officers of the company?

379 Now, gentlemen, all the material points in this case must be considered upon the evidence, and your minds must be influenced in arriving at a verdict in this case by nothing but the evidence. You are here to find the facts. It is the duty of the court to give you the law, and you must take the law as the court gives it to you, but you are the judges of the facts and you are the judges of the credibility of witnesses. It is for you to say which of the witnesses are to be believed and which you will disbelieve; in other words, you are to weigh the evidence, and upon any point on which there is a conflict in the evidence you must look to see which side has the preponderance of the evidence upon such point. It is not the number of witnesses which is to be considered, but the weight or credibility that you give to the statements of witnesses, and it is to be determined by a number of things. It is of the first importance that the witness to be entitled to credit should be in a position to know the facts about which he testifies. Then you will note the position or relations of the witness to the case—whether he is under any influence to induce him to equivocate or falsify; what interest, pecuniary or otherwise, he has in the controversy; his conduct and demeanor upon the stand; his willingness or unwillingness to testify upon any point—and from all these indications weigh the evidence which has been given.

The plaintiff must establish every material fact by a preponderance of evidence; and the defendant having alleged negligence on the part of the plaintiff, denominated contributory negligence, it must be established by a preponderance of evidence to warrant you in finding it, and upon this question you must decide. It is for you to determine whether the plaintiff by his want of care and caution, which want of care and caution caused or contributed proximately to the injury,—; if you so find, then the plaintiff cannot recover in this action.

If you find from the evidence that the plaintiff is entitled to recover in this action the next question for you to consider will be the amount of damages he should recover.

380 These damages cannot be computed in dollars and cents; they must be estimated, and for the purpose of estimating such damages you may take into consideration the physical and mental suffering he has endured, and from these find some definite sum which, in your judgment, under all circumstances, he ought to recover for his injury.

If you find for the plaintiff your verdict will be: "We, the jury, find for the plaintiff" (such sum as you shall agree upon).

If you find the plaintiff is not entitled to recover your verdict will be: "We, the jury, find for the defendant."

Your verdict must be in writing.

Exceptions of Defendant to Charge of Court.

And the defendant did then and there, by its counsel, duly except to that portion of said charge which reads as follows:

"And a failure to do so might be negligence on his part. But, gentlemen, it is for you to say, from all the attending circumstances, whether he was neglectful in that regard.

"While this rule of law above stated is generally true, a reasonable view must be taken in its application here. The evidence tends to show that this plaintiff had been at work in this yard but a short time, and only a part of that time with or under this engineer, Bassett. Now, had he such knowledge or had he such an opportunity to know of the careless and reckless habits of Bassett's that rendered it dangerous for him to work with him, and made it his duty to have refused to continue in such service or to have reported him to the officers of the company."

The defendant did then and there, by its counsel, duly except to that portion of said charge of the court given of its own motion, which reads as follows:

"And the defendant, having alleged negligence on the part of the plaintiff denominated contributory negligence, it must be established by preponderance of evidence to warrant you in finding it."

381 That thereupon the jury retired to deliberate upon their verdict, and, on the 29th day of June, 1883, being one of the regular days of said June term of said court, returned into court and rendered their verdict in said action as follows:

"We, the jury, find for the plaintiff in the sum of twenty thousand ($20,000) dollars.

"Fargo, 6th, 29, 1883.

"A. E. HENDERSON,
"*Foreman.*"

Which verdict was then and there duly recorded.

Exception to Verdict.

And afterwards, to wit, on the 15th day of February, A. D. 1884, the defendant's counsel, against the objection and exception of the plaintiff's counsel, proposed the following exception, viz:

And now comes the defendant, by its counsel, and excepts to the verdict rendered in said action, and above set forth, upon the following grounds:

I.

1. Because the evidence failed to show that the defendant did not use ordinary care in the selection of its engineer.

2. Because the evidence is insufficient to show or establish that the defendant had neglected to use ordinary care in the selection of the alleged culpable engineer, Bassett.

3. Because the evidence failed to show that the defendant, or the agents or servants of the defendant, whose duty it was at that time, or prior to the injury complained of, to discharge said Bassett, if he was an unfit, careless, reckless, or incompetent engineer, knew, or by the exercise of due care would have discovered, that said Bassett was an unfit, careless, reckless, or incompetent engineer.

382 4. Because the evidence failed to show, and is insufficient to show, that at and prior to the time of the alleged injury, or at any time while in defendant's employ, the said engineer, Bassett, was an unfit, careless, reckless, or incompetent engineer.

5. Because the evidence fails to show, and is insufficient to show, that the plaintiff was injured by or through the negligence of the defendant, or by or through or on account of the negligence of said engineer, Bassett.

6. Because the evidence given by and on the part of the plaintiff shows that the plaintiff contributed to the injury of which he complains by getting upon the car while in motion, in the dark, and standing within a few feet of the rear end of such car while it was being pushed back by the engine without taking any precaution or adopting any means of protecting himself against accident.

7. Because the evidence given by and on the part of the plaintiff clearly shows that the plaintiff contributed to the alleged injury by continuing in the employment of the defendant if the engineer, Bassett, was an unfit, careless, reckless, or incompetent engineer, not only having then and there the means of knwing, but actually knowing, of the character of said engineer Bassett and of his fitness for the employment, and without making complaint thereof to his superior officers.

8. Because the evidence adduced upon the trial shows that shortly prior to the accident Bassett, the engineer, had become irritated, and was handling the engine and cars which were being switched in a dangerous and reckless manner, to the knowledge and observation of the plaintiff himself; and that notwithstanding such facts the plaintiff voluntarily mounted the car from which he afterwards fell,

and placed himself voluntarily while riding upon the same in a position of peril.

Which said above and foregoing exceptions were by the court allowed to be inserted in and made a part of the case.

883 That thereafter and on the 27th day of October, 1883, the defendant, by its counsel, personally served upon the plaintiff's attorneys at Moorhead, in the State of Minnesota, the same being the place of residence and place of business of Briggs & Elders, of plaintiff's attorneys herein, a copy of the following notice of its intention to move for a new trial in said action, said service being then and there made within the time given by the court by its order duly entered herein, for good cause shown, a copy of the same notice having, on the 20th of October, 1883, been served on Wilson & Ball, also attorneys for plaintiff herein, personally, at Fargo, D. T.

TERRITORY OF DAKOTA, *County of Cass:*

In District Court, Third Judicial District.

RICHARD MARKS vs. NORTHERN PACIFIC RAILROAD COMPANY.

To the above-named plaintiff, to Briggs & Elders, Wilson & Gale and Wilson & Ball, his attorneys in the above-entitled action:

Take notice that the defendant intends to move the court to vacate and set aside the verdict rendered in the above cause and to grant a new trial of said cause upon the following grounds, to wit:

I. Because the court in the formation of the trial jury sustained the challenges of plaintiff to certain jurors for cause, to which defendant duly excepted.

884 II. Newly discovered evidence, material to the defendant, which it could not with reasonable diligence have discovered and produced at the trial.

III. Excessive damages, appearing to have been given under the influence of passion or prejudice.

IV. Insufficiency of the evidence to justify the verdict.

V. That the verdict is against law.

VI. Errors in law, occurring at the trial and excepted to by the defendant, to wit:

1. In admitting evidence under the complaint against defendant's objection.

2. In admitting evidence for the plaintiff against defendant's objection.

3. In rejecting evidence offered by the defendant and objected to by the plaintiff.

4. In refusing to grant the defendant's motion to nonsuit the plaintiff made by the defendant when the plaintiff had rested his main case.

5. In refusing to grant the defendant's motion to dismiss the action at the close of the testimony.

6. In refusing to instruct the jury to find a verdict for the defendant, as requested by defendant.

7. In refusing to give other instructions requested by the defendant.
8. In giving instructions to the jury asked by the plaintiff.
9. Errors in the charge of the court, given of his own motion.

Said motion will be made upon a bill of exceptions hereafter to be prepared and filed and served upon you, and upon the records of said cause.

Dated Oct. 19th, 1883.

W. P. CLOUGH,
W. B. McCONNELL &
THOMAS & BENTON,
Defendant's Attorneys.

385 [Endorsed:] Dis't c'rt, Cass Co. Richard Mares vs. Northern Pacific Railroad Company. Notice of intention to move for a new trial.

Due and personal service of a copy of within notice of intention to move for a new trial admitted this 20th day of October, 1883, at Fargo, D. T.

WILSON & BALL,
Plaintiff's Attorneys.

TERRITORY OF DAKOTA, } ss:
County of Cass, }

Charles F. Amidon, being duly sworn, deposes and says that he is and has been for more than two months last past a clerk in the office of Thomas & Benton, defendant's attorneys in the within-entitled action, and is over twenty years of age; that on the 27th day of October, 1883, at Moorhead, in the State of Minnesota, he served the within notice of intention to move for a new trial upon Briggs & Elders, the plaintiff's attorneys in the within-entitled action, at their office in Moorhead aforesaid, by then and there delivering to and leaving with Mr. Elder, a member of said firm of Briggs & Elders, personally, a true and correct copy thereof.

CHARLES F. AMIDON.

Subscribed and sworn to before me this 14th day of November, 1883.

[NOTARIAL SEAL.] JOHN W. SEARING,
Notary Public, Cass Co., D. T.

386 That thereafter and on the 3rd day of November, 1883, at Moorhead, in the State of Minnesota, the defendant, by its counsel, duly served upon Briggs & Elders, the plaintiff's attorneys herein, a copy of said notice of its intention to move for a new trial herein, with the further notice thereto attached, as follows:

"Said motion will be made upon a statement of the case instead of upon a bill of exceptions, as stated in our former notice served

upon you; also said motion will be based upon the record of said cause.

"Dated October 31st, 1883.

"W. P. CLOUGH,
"W. B. McCONNELL, &
"THOMAS & BENTON,
"*Defendant's Attorneys.*"

That the service of said last notice was also made upon said Briggs & Elders personally within the time given by the court therefor, for good cause shown.

Which said notice is the following:

TERRITORY OF DAKOTA, *County of Cass:*

In the District Court, Third Judicial District.

RICHARD MARES
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY.

To the above-named plaintiff, to Briggs & Elders, Wilson & Ball, and Wilson & Gale, his attorneys in the above-entitled action:

Take notice that the defendant intends to move the court to vacate and set aside the verdict rendered in the above cause and
387 to grant a new trial of said cause upon the following grounds, to wit:

I. Because the court in the formation of the trial jury sustained the challenges of the plaintiff to certain jurors for cause; to which the defendant duly excepted.

II. Newly-discovered evidence, material to the defendant, which it could not, with reasonable diligence, have discovered and produced at the trial.

III. Excessive damages, appearing to have been given under the influence of passion or prejudice.

IV. Insufficiency of the evidence to justify the verdict.

V. That the verdict is against law.

VI. Errors in law, occurring at the trial and excepted to by the defendant, to wit:

1. In admitting evidence under the complaint against defendant's objections.

2. In admitting evidence for the plaintiff against defendant's objections.

3. In rejecting evidence offered by defendant and objected to by the plaintiff.

4. In refusing to grant defendant's motion to nonsuit the plaintiff, made by the defendant, when the plaintiff had rested his main case.

5. In refusing to grant defendant's motion to dismiss the action at the close of the testimony.

6. In refusing to instruct the jury to find a verdict for the defendant, as requested by defendant.

7. In refusing to give other instructions requested by the defendant.
8. In giving instruction to the jury asked by the plaintiff.
9. Errors in the charge of the court, given of his own motion.

388 Said motion will be made upon a statement of the case hereafter to be prepared, instead of upon a bill of exceptions, as stated in our former notice served upon you; also said motion will be based upon the record of said cause.

Dated Oct. 30th, 1883.

W. P. CLOUGH &
W. B. McCONNELL &
THOMAS & BENTON,
Defendant's Attorneys.

389 [Endorsed:] Dist. c'rt Cass Co. Richard Mares *vs.* N. P. R. R. Company. Notice of intention to move for a new trial.

Personal service of a copy of within notice of intention to move for new trial admitted the 3rd day of November, 1883, at Moorhead, Minn.

BRIGGS & ELDERS,
Pl'ff's Att'ys.

390 *Specification of Particulars in which the Evidence is Insufficient to Justify the Verdict.*

I.

1. Because the evidence failed to show that the defendant did not use ordinary care in the selection of its engineer.
2. Because the evidence was insufficient to show or establish that the defendant had neglected to use ordinary care in the selection of the alleged culpable employee Bassett.
3. Because the evidence failed to show that the defendant, or the agents or servants of the defendant whose duty it was at that time or prior to the injury complained of to discharge said Bassett if he was an unfit, careless, reckless, or incompetent engineer, knew, or by the exercise of due care would have discovered, that said Bassett was an unfit, careless, reckless, or incompetent engineer.
4. Because the evidence failed to show and is insufficient to show that, at and prior to the time of the alleged injury or at any time while in the defendant's employ, the said engineer Bassett was an unfit, careless, reckless, or incompetent engineer.
5. Because the evidence failed to show and is insufficient to show that the plaintiff was injured by or through the negligence of the defendant or by or through or on account of the negligence of said engineer Bassett.
6. Because the evidence given by and on the part of the plaintiff shows that the plaintiff contributed to the injury of which he complains by getting upon the car while in motion in the dark and standing within a few feet of the rear end of such car while it was

being pushed back by the engine and without taking
391 & 392 any precaution or adopting any means of protecting himself against accident.

7. Because the evidence given by and on the part of the plaintiff clearly shows that the plaintiff contributed to the alleged in-
393 jury by continuing in the employment of the defendant if the engineer Bassett was an unfit, careless, reckless, or incompetent engineer, not only having then and there the means of knowing, but actually knowing, of the character of said engineer Bassett and of his fitness for that employment, and without making complaint thereof to his superior officers.

II.

The evidence was insufficient to sustain the verdict for the sum of twenty thousand dollars, and clearly shows that said verdict for said amount is excessive and that the same was given under the influence of passion or prejudice.

Errors of Law.

I.

The court erred in sustaining the challenge for cause made by the plaintiff to the juror Ely Green in the formation of the jury.

(See evidence and ruling, page 1 to page 5.)

2. The court erred in sustaining the challenge for cause made by the plaintiff to the juror Ebon Young.

(See evidence and ruling, page 5 to page 8.)

II.

The court erred in overruling the defendant's objection to the introduction of any evidence under the complaint for the reason that it does not allege facts sufficient to constitute a cause of action.

(See page 9 of transcript.)

III.

The court erred in overruling the defendant's objection to the question on page 10 of abstract as follows: "Question. After you learned it how much could you have earned at your trade of blacksmith per day?"

394 "The defendant objects to this question upon the ground that it is incompetent; which objection is overruled by the court."

IV.

The court erred in overruling the defendant's objection to the following question put by plaintiff's counsel to the witness Galvin:

"Q. Prior to the injury to the plaintiff and during the autumn when this plaintiff was injured do you know what the general reputation of Bassett was as to being a careful or a careless or a reckless

man in the performance of his duties as engineer? I simply ask you now do you know what his general reputation was in that respect at this place—at Fargo—where this accident happened?"

To which question the defendant, by its counsel, then and there objected on the ground that it is incompetent and immaterial.

Which objection was then and there overruled by the court; to which ruling the defendant then and there, by its counsel, duly excepted, and the evidence was thereupon admitted.

(See page 97 of transcript.)

V.

The court erred in overruling the defendant's motion to dismiss said action upon the ground that the plaintiff had failed to adduce evidence to sustain his cause of action.

Which motion was made by defendant's counsel at the close of the plaintiff's case and after the plaintiff had rested and before the defendant had offered any evidence.

Which motion, ruling, and exception appear on page 189 of transcript.

VI.

The court erred in overruling defendant's demurrer to the evidence and motion to dismiss said action made by defendant's counsel at the close of all the testimony adduced in said action.

Which demurrer, motion, reasons therefor, and exception to the ruling of the court appear on pages 352–353 of transcript.

395 VII.

The court erred in refusing to instruct the jury at the request of defendant's counsel as follows:

"The jury are hereby instructed and directed to find for the defendant."

Which request, instruction, and exception to such refusal appear on page 353 of transcript.

VIII.

The court erred in refusing to give to the jury the following instructions at the request of defendant's counsel:

"If the plaintiff knew or had the opportunity of knowing, before his fall from the car in question, that Bassett was an unfit or unsafe man to run the engine in question, in that case it was the plaintiff's duty to refuse to work with him any longer, and his failure to do so would prevent him from recovery in this suit."

Which request and instruction and exception to the refusal of the court appear on page 353 of transcript.

VIII½.

Because the evidence adduced upon the trial shows that shortly prior to the accident Bassett, the engineer, had became irritated and was handling the engine and cars which were being switched in a

dangerous and careless manner, to the knowledge and observation of the plaintiff himself, and, notwithstanding such facts, the plaintiff voluntarily mounted the car from which he afterwards fell and placed himself voluntarily, while riding upon the same, in a position of peril.

IX.

The court erred in refusing to give to the jury the following instruction at the request of defendant's counsel:

"The evidence adduced on behalf of the plaintiff tended to show that Bassett was guilty of negligence in running his engine during the same night on which the plaintiff was hurt previous to the accident and while the plaintiff was working with him. If the jury believe such to have been the fact it must find for the defendant."

396 Which request and instruction and exception to the refusal of the court appear on pages 353 and 354 of transcript.

X.

The court erred in refusing to give the jury the following instruction at the request of defendant's counsel:

"The jury should find for the defendant in this suit."

Which request and instruction and exception to the refusal of the court appear on page 354 of transcript.

XI.

That the court erred in giving to the jury the instructions requested by the plaintiff's counsel and each of them to which the defendant has excepted.

Which instructions and exceptions appear on page 355 to 358 of transcript.

XII.

The court erred in giving to the jury the following instructions requested by plaintiff's counsel:

"The jury have not legally a right to find that the plaintiff Mares was guilty of negligence which contributed to his injury unless the jury finds that this fact is shown by a preponderance of evidence."

(See instruction and exception on page 358 of transcript.

XIII.

That the court erred in that portion of his charge given of his own motion to the jury which reads as follows:

"And a failure to do so might be negligence on his part; but, gentlemen, it is for you to say, from all the attending circumstances, whether he was neglectful in that regard.

"While this rule of law above stated is generally true, a reasonable view must be taken in its application here. The evidence tends to show that this plaintiff had been at work in this yard but

a short time, and only part of that time with or under this
397 engineer, Bassett. Now, had he such knowledge, or had he such an opportunity to know, of the careless and reckless habits of Bassett that rendered it dangerous for him to work with him and made it his duty to have refused to continue in such service or have reported him to the officers of the company?"

Which portion of said charge last above assigned as error appears on page 361 of transcript.

XIV.

The court erred in giving to the jury that portion of his charge given of his own motion which reads as follows:

"And the defendant having alleged negligence on the part of the plaintiff, denominated contributory negligence, it must be established by a preponderance of evidence to warrant you in finding it."

Which portion of charge last above assigned as error appears on page 362 of transcript.

398 The following stipulation was, on the 3rd day of January, 1884, entered into between the attorneys of the respective parties hereto, and filed with the clerk of this court January 4th, 1884.

TERRITORY OF DAKOTA, *County of Cass:*

In District Court, Third Judicial District.

RICHARD MARIS vs. NORTHERN PACIFIC RAILROAD COMPANY.

It is hereby stipulated by and between the parties to this action that the motion for a new trial herein this day served shall be heard on any day prior to February 15th, 1884, the day named in said motion, upon the consent of Thomas Wilson, one of the attorneys for the plaintiff, and of W. P. Clough, one of the attorneys for the defendant herein, with the same effect as though said motion be argued on the day named in the motion.

It is further stipulated that the statement of the case may be settled, signed, and made a matter of record herein on the day said motion is argued, or any time prior to such day if the above-named attorneys desire to settle said statement prior to the day of hearing; that no advantage shall be taken by reason of the fact that the motion for a new trial is made before the settlement of said case, but, in that respect, the motion in all respects shall stand and be heard with the same effect as though the statement had first been set-
tled, signed, and made a matter of record and the motion
399 thereafter and thereon made.

It is further stipulated that if for any reason it becomes necessary for the court to make any order extending the time for settlement of the case, filing exceptions, and making motion for new trial such order may be made and entered by the court at the time of the settlement of the case with the same effect as though said

order had been made and entered at or prior to the time the order now in force extending time expired.

January 3rd, 1884.

W. P. CLOUGH,
W. B. McCONNELL, &
THOMAS & BENTON,
Def't's Att'ys.
THOMAS WILSON,
BRIGGS & ELDERS, &
WILSON & BALL,
Pl'ff's Att'ys.

400 [Endorsed:] Dist. c'rt, Cass Co. Richard Mares *vs.* N. P. R. R. Co. Stipulation. Filed Jan. 4th, 1884. N. C. Morgan, clerk, by E. R. Wisell, dep.

401 *Motion for New Trial.*

(Title.)

TERRITORY OF DAKOTA, *County of Cass:*

Third Judicial District.

RICHARD MARES *vs.* NORTHERN PACIFIC R. R. COMPANY.

To the plaintiff, Richard Mares, and to Briggs & Elders, Wilson & Gale, and Wilson & Ball, his attorneys:

Take notice that at the court-house in the city of Fargo, county of Cass and Territory of Dakota, on the 15th day of February, A. D. 1884, the defendant will move the court in the above-entitled action for a new trial therein upon the grounds specified in the statement of the case in said action, which are as follows:

I.

Insufficiency of the evidence to justify the verdict, in this:

1. Because the evidence failed to show that the defendant did not use ordinary care in the selection of its engineer.

402 2. Because the evidence was insufficient to show or establish that the defendant had neglected to use ordinary care in the selection of the alleged culpable engineer Bassett.

3. Because the evidence failed to show that the defendant, or the agents or servants of the defendant whose duty it was at that time or prior to the injury complained of to discharge said Bassett if he was an unfit, careless, reckless or incompetent engineer, knew, or by the exercise of due care would have discovered, that said Bassett was an unfit, careless, reckless, or incompetent engineer.

4. Because the evidence failed to show and is insufficient to show that, at and prior to the time of the alleged injury or at any time while in defendant's employ, the said engineer Bassett was an unfit, careless, reckless, or incompetent engineer.

5. Because the evidence failed to show and is insufficient to show that the plaintiff was injured by or through the negligence of the

defendant or by or through or on account of the negligence of said engineer Bassett.

6. Because the evidence given by and on the part of the plaintiff shows that the plaintiff contributed to the injury of which he complains by getting upon the car while in motion in the dark and standing within a few feet of the rear end of such car while it was being pushed back by the engine without taking any precaution or adopting any means of protecting himself against accident.

7. Because the evidence given by and on the part of the plaintiff clearly shows that the plaintiff contributed to the alleged injury by continuing in the employment of the defendant if the engineer Bassett was an unfit, careless, reckless, or incompetent engineer, not only having then and there the means of knowing, but actually knowing, of the character of said engineer Bassett and of his fitness for that employment, and without making complaint thereof to his superior officers.

8. Because the evidence adduced upon the trial shows that shortly prior to the accident Bassett, the engineer, had become irri-
403 tated and was handling the engine and cars which were being switched in a dangerous and reckless manner, to the knowledge and observation of the plaintiff himself, and, notwithstanding such facts, the plaintiff voluntarily mounted the car from which he afterwards fell and placed himself voluntarily, while riding upon the same, in a position of peril.

II.

The evidence was insufficient to sustain the verdict for the sum of twenty thousand dollars, and clearly shows that said verdict for said amount is excessive and that the same was given under the influence of passion or prejudice.

Errors of Law.

I.

1. The court erred in sustaining the challenge for cause made by the plaintiff to the juror Ely Green in the formation of the jury. (See evidence and ruling, page 1 to page 5 of transcript.)

2. The court erred in sustaining the challenge for cause made by the plaintiff to the juror Ebon Young. (See evidence and ruling, page 5 to page 8 of transcript.)

II.

The court erred in overruling the defendant's objection to the introduction of any evidence under the complaint for the reason that it does not allege facts sufficient to constitute a cause of action. (See page 9 of transcript.)

III.

The court erred in overruling the defendant's objection to the question on page 10 of abstract as follows:

"Question. After you learned it how much could you have earned at your trade of blacksmith per day?"

404 "The defendant objects to this question upon the ground that it is incompetent; which objection is overruled by the court."

IV.

The court erred in overruling the defendant's objection to the following question put by plaintiff's counsel to the witness Galvin:

"Q. Prior to the injury to this plaintiff and during the autumn when this plaintiff was injured do you know what the general reputation of Bassett was as to being a careful or a careless or reckless man in the performance of his duties as engineer? I simply ask you now do you know what his general reputation was in that respect at this place—at Fargo—where this accident happened?"

To which question the defendant, by its counsel, then and there objected on the ground that it is incompetent and immaterial; which objection was then and there overruled by the court; to which ruling the defendant then and there, by its counsel, duly excepted, and the evidence was thereupon admitted. (See page 91 of transcript.)

V.

The court erred in overruling the defendant's motion to dismiss said action upon the ground that the plaintiff had failed to adduce evidence to sustain his cause of action.

Which motion was made by defendant's counsel at the close of the plaintiff's case and after the plaintiff had rested and before the defendant had offered any evidence.

Which motion, ruling, and exception appear on page 189 of transcript.

VI.

The court erred in overruling defendant's demurrer to the evidence and motion to dismiss said action made by defendant's counsel at the close of all the testimony adduced in said action; which demurrer,

405 motion, reasons therefor, and exception to the ruling of the court appear on pages 352–353 of transcript.

VII.

The court erred in refusing to instruct the jury, at the request of defendant's counsel, as follows: "The jury are hereby instructed and directed to find for the defendant;" which request, instruction, and exception to such refusal appear on page 353 of transcript.

VIII.

The court erred in refusing to give to the jury the following instructions at the request of defendant's counsel:

"If the plaintiff knew or had the opportunity of knowing, before his fall from the car in question, that Bassett was an unfit or an unsafe man to run the engine in question, in that case it was the plaintiff's duty to refuse to work with him any longer, and his failure to do so would prevent him from recovering in this suit."

Which request and instruction and exception to the refusal of the court appear on page 353 of transcript.

IX.

The court erred in refusing to give to the jury the following instruction at the request of defendant's counsel:

"The evidence adduced on behalf of the plaintiff tended to show that Bassett was guilty of negligence in running his engine during the same night in which the plaintiff was hurt, previous to the accident, and while the plaintiff was working with him. If the jury believe such to have been the fact it must find for the defendant."

Which request and instruction and exception to the refusal of the court appear on pages 353 and 354 of transcript.

X.

The court erred in refusing to give to the jury the following instruction at the request of defendant's counsel:

"The jury should find for the defendant in this suit."

406 Which request and instruction and exception to the refusal of the court appear on page 354 of transcript.

XI.

That the court erred in giving to the jury the instructions requested by the plaintiff's counsel and each of them to which the defendant has excepted; which instructions and exceptions appear on pages 355 to 358 of the transcript.

XII.

That the court erred in giving to the jury the following instructions requested by plaintiff's counsel:

"The jury have not legally a right to find that the plaintiff, Mares, was guilty of negligence which contributed to his injury, unless the jury finds that that fact is shown by a preponderance of evidence." (See instruction and exception on page 358 of transcript.)

XIII.

That the court erred in that portion of his charge, given of his own motion to the jury, which reads as follows:

"And a failure to do so might be negligence on his part; but, gentlemen, it is for you to say, from all the attending circumstances, whether he was neglectful in that regard.

"While this rule of law above stated is generally true a reasonable view must be taken in its application here. The evidence tends to show that this plaintiff had been at work in this yard but a short time, and only a part of that time with or under the engineer, Bassett. Now, had he such knowledge or had he such an opportunity to know of the careless and reckless habits of Bassett that rendered it dangerous for him to work with him and made it his duty to have refused to continue in such service or have reported him to the officers of the company?"

Which portion of said charge last above assigned as error appears on page 361 of transcript.

407 XIV.

The court erred in giving to the jury that portion of his charge, given of his motion, which reads as follows:

"And the defendant having alleged negligence on the part of the plaintiff denominated contributory negligence, it must be established by preponderance of evidence to warrant you in finding it."

Which portion of charge last above assigned as error appears on page 362 of manuscript.

Said motion is based and will be made upon the statement of the case herein, to be settled in accordance with the stipulation made herein this day and this day filed, and upon the record and all papers on file in said action.

408 I, Sanford A. Hudson, one of the associate justices of the supreme court of Dakota Territory and judge of the third judicial district of said Territory and presiding judge on the trial of the foregoing action, hereby certify that the above and foregoing statement contains all the evidence adduced, interposed, and given in said cause on the trial thereof and all the proceedings had
409 and exceptions taken thereon, and all the evidence adduced, interposed, and given on the trial of the challenges for cause of the proposed jurors, Ely and Green and Ebon Young, in the formation of the trial jury therein.

Dated February 15, 1884, at Fargo, D. T.

S. A. HUDSON, *Judge.*

And, inasmuch as the matters aforesaid are not of record, the judge before whom the proceedings were had and said trial took place now here settles and signs this statement of the case, pursuant to the statutes in such case made and provided, that the proceedings aforesaid may be made matters of record, with the privilege given to either or both of the parties to this action of turning the same into a bill of exceptions for the purpose of appeal, which is done accordingly, and the clerk of said district court in and for Cass county, Dakota Territory, will file this statement of the case as a record in said cause.

Done at the court-house, in the city of Fargo, in the county of Cass and Territory of Dakota, this 15th day of February, 1884.

The notice of intention to move for a new trial herein having been served by the defendant upon the plaintiff, herein set forth, within the time given by the court for good cause shown, by orders made from time to time by the court and duly entered, extending the time for such purpose, and the settlement of this statement of the case and all acts and proceedings therein and therewith connected having been done and had within the time given and allowed by the court for good cause by its orders duly entered as aforesaid.

Dated February 15th, 1884, at Fargo, D. T.

S. A. HUDSON, *Judge.*

Filed February 16, 1884.

N. C. MORGAN, *Clerk,*
By E. R. WISWELL, *Dep.*

410 TERRITORY OF DAKOTA, } ss:
Third Judicial District, Cass County, }

RICHARD MARES, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD CO., Defendant.

The motion for a new trial in the above-entitled action coming up for argument at the December term of said court, W. P. Clough, Esquire, appearing for the motion and Messrs. Wilson & Ball and Thomas Wilson, Esquires, against, and after argument, the same having been taken under advisement, now, after due consideration, the said motion is denied.

Dated March 18th, 1884.

S. A. HUDSON, *Judge.*

And now comes the defendant in the above-entitled action and excepts to the foregoing order denying and overruling its motion for a new trial therein, and at the request of defendant's counsel the exception and said order denying and overruling said motion for a new trial therein, and the motion for a new trial made therein by the defendant, on which said order is based, and all papers therewith connected, contained, and inserted in the statement of the case therein, are hereby made a part of the record in said action.

Dated at Fargo, D. T., April 3rd, 1884.

S. A. HUDSON, *Judge.*

411 [Endorsed:] Filed Ap'l 3rd, 1884. N. C. Morgan, clerk, by E. R. Wiswell, dep.

412 TERRITORY OF DAKOTA, *County of Cass:*

District Court, Third Judicial District.

At a general term of the district court within and for said county of Cass, in the third judicial district of Dakota Territory, held at the court-house, in the city of Fargo, on the first Tuesday of June, A. D. 1883.

Present: The Hon. S. A. Hudson, presiding judge, and the other officers of said court.

Judgment for Plaintiff on Trial.

RICHARD MARES, Pl'ff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

This action having been tried by jury at the district court, held at the court-house, in the city of Fargo, in and for said county, on the 29th day of June, A. D. 1883, before the Hon. S. A. Hudson, judge, and the jury having rendered a verdict for said plaintiff and against said defendant therein for the sum of twenty thousand dollars, and said verdict having been entered in the minutes of the said court,

now, on motion of Thomas Wilson & Wilson & Ball, plaintiff's attorneys, it is considered and adjudged by the court that said plaintiff recover of the said defendant the sum of twenty thousand dollars, together with thirty-six $\frac{36}{100}$ dollars for his costs and disbursements, amounting in the whole to the sum of $20,036.—

Done in open court this 10th day of April, 1884.

S. A. HUDSON, *Judge.*

Attest: N. C. MORGAN, *Clerk.*

413 [Endorsed:] District court, third judicial district, county of Cass. Richard Mares *vs.* Northern Pacific Railroad Company. Judgment-roll on trial. Thos. Wilson & Wilson & Ball, plaintiff's attorneys, Fargo, D. T. Filed April 10th, 1884, at 12 o'clock noon. N. C. Morgan, clerk.

414 TERRITORY OF DAKOTA, *County of Cass:*

In District Court, Third Judicial District, in and for said County and Territory.

RICHARD MARES, Plaintiff,

vs.

THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

On motion of defendant's attorneys in the above-entitled action, the plaintiff's attorneys therein consenting thereto, it is hereby ordered that defendant have sixty days from this date to serve upon the plaintiff a notice of its intention to move for a new trial, and to make and serve a motion for a new trial herein, and to make such other motion in the premises as it may be advised; and in the meantime it is further ordered that all proceedings herein on the part of plaintiff be, and they hereby are, staid.

Dated at Fargo, D. T., June 30th, 1883.

By the court: S. A. HUDSON, *Judge.*

415 [Endorsed:] District court, Cass county. Richard Mares *vs.* Northern Pacific R. R. Co. Order extending time to move for a new trial and stay of proceedings. Filed June 30th, 1883. N. C. Morgan, clerk. We hereby consent to the within order. Fargo, D. T., June 30th, '83. Wilson & Ball, of counsel for plaintiff.

416 WEDNESDAY, *Aug.* 22, 1883—55th day.

This day court met pursuant to adjournment at 10 o'clock a. m.

Present: Hon. S. A. Hudson, judge; J. E. Haggart, sheriff, by C. W. Haggart, deputy; N. C. Morgan, clerk.

RICHARD MARES

vs.

THE NORTHERN PACIFIC RAILROAD COMPANY.

And now, by agreement of counsel for the respective parties, in open court, the court orders that the defendant have sixty days further time in which to move for new trial, to make bill of exceptions, etc., herein.

417 TERRITORY OF DAKOTA, *County of Cass:*

In District Court, Third Judicial District.

RICHARD MARES, Plaintiff,

vs.

THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

On motion of defendant's attorneys in the above-entitled action, the plaintiff's attorneys therein consenting thereto, it is hereby ordered that defendant have 30 days from this date to serve upon plaintiff a notice of its intention to move for a new trial and make and serve a motion for a new trial herein, and to make such other motion in the premises as it may be advised; and in the meantime it is further ordered that all proceedings herein on the part of the plaintiff be, and they are hereby, stayed.

Dated at Fargo, D. T., October 18th, 1883.

By the court:

S. A. HUDSON, *Judge.*

418 [Endorsed:] District court, Cass county. R. Mares *vs.* N. P. R. R. Co. Order granting time to make motion for new trial, etc. Filed October 18th, 1883. N. C. Morgan, clerk, by E. R. Wiswell, deputy. We hereby consent to the within order. Thomas Wilson and Wilson & Ball, pl'ff's att'ys. Oct. 18th, 1883.

419 TERRITORY OF DAKOTA, } *ss:*
County of Cass, }

In District Court, Third Judicial District.

RICHARD MARES

vs.

THE NORTHERN PACIFIC RAILROAD COMPANY.

Alfred D. Thomas, being duly sworn, deposes and says that he is one of the attorneys for the defendant in the above-entitled action, and was on the 18th day of October last specially employed by said defendant to prepare and make a motion for a new trial therein, and at once commenced the preparation of a case on which to base said motion; that, owing to the illness of deponent during the last three weeks, he has not been able to fully prepare said case and make said motion; that during said time deponent has suffered a severe pain in his head and has not been able to keep up his business, except ordinary matters; that he employed a clerk to assist him in
420 the preparation of said case and motion, and said clerk has disappointed him and notified deponent this day that he is unable to proceed with said work for the present; that deponent is now actively engaged in the preparation of said case and motion, but that it will be impossible for deponent to complete the same and make said motion by the 18th of this month, the time heretofore allowed by this court for making the same.

Deponent therefore prays an extension of time to file exceptions, prepare and have settled a case, and make and serve a motion for a new trial in said action, and take such other action therein as may be necessary and requisite for the same, until the 12th day of December, 1883, and that all proceedings on the part of the plaintiff therein be staid in the meantime. Deponent further says that he has served upon the plaintiff's attorneys a notice to make such motion.

A. D. THOMAS.

Subscribed and sworn to before me this 12th day of November, 1883.

[NOTARIAL SEAL.] ORRIN W. FRANCIS,
Notary Public.

421 TERRITORY OF DAKOTA, *County of Cass:*

In District Court, Third Judicial District.

RICHARD MARES
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY.

It appearing by the annexed affidavit of Alfred D. Thomas, one of the defendant's attorney's in the above-entitled action, that good cause exists therefor, and on motion of W. P. Clough, W. B. McConnell, and Thomas & Benton, defendant's attorneys in said action—

It is now here ordered that defendant have until the 12th day of December, 1883, in which to file exceptions, prepare and have settled a case, and make and serve a motion for a new trial, and take such other action therein as may be requisite and necessary for the same, and in the meantime it is further ordered that all proceedings on the part of the plaintiff in said action be staid.

Dated Grand Forks, November 13th, 1883.

S. A. HUDSON, *Judge.*

422 [Endorsed:] District court, Cass county. Richard Mares *vs.* Northern Pacific Railroad Company. Order extending time to settle statement and make motion for new trial. Filed Nov. 16th, 1883. N. C. Morgan, clerk, by E. R. Wiswell, dep.

423 TERRITORY OF DAKOTA, *County of Cass:*

In District Court, Third Judicial District.

RICHARD MARES
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY.

It is hereby ordered that the defendant have until the 12th day of January, 1884, in which to file exceptions, prepare and have settled a case, and make and serve a motion for a new trial herein, and take such other action as may be requisite and necessary herein for that purpose.

And that in the meantime all proceedings on the part of the plaintiff herein be staid.

This order is granted on motion of defendant's attorneys, the plaintiff's attorneys assenting thereto.

Dated Dec. 11th, 1883.

S. A. HUDSON, *Judge.*

424 [Endorsed:] District court, Cass county. Richard Mares *vs.* The Northern Pacific Railroad Company. Order extending time. We consent to the within order. Thomas Wilson, Briggs & Elders, & Wilson & Ball, plaintiff's attorneys. Dated Dec. 11th, 1883. Filed Dec. 12th, 1883. N. C. Morgan, clerk, by E. R. Wiswell, dep.

425 TERRITORY OF DAKOTA, *County of Cass:*

In District Court in and for Cass County, Third Judicial District, Territory of Dakota.

RICHARD MARES *vs.* NORTHERN PACIFIC RAILROAD COMPANY.

I, S. A. Hudson, presiding judge of said district court, who presided at the trial of the above-entitled action, do hereby certify that the foregoing papers, to wit, the summons and complaint, answer, reply, verdict, statement of the case, certificate of the judge thereto, order overruling motion for new trial and exception thereto, are cont-inued in and constitute the judgment-roll and the whole thereof in the above-entitled action as the same now remains of record in the said district court; also that the foregoing orders extending time to the defendant to give notice of its intention to move for a new trial and make a motion for a new trial in said action were all duly entered and made, and the time was duly extended to the 12th day of January, 1884.

Dated at Fargo, D. T., this 28th day of April, 1884.

S. A. HUDSON, *Judge.*

426 TERRITORY OF DAKOTA, }
Third Judicial District, County of Cass, } *ss:*

I, N. C. Morgan, clerk of the district court within and for Cass county, in the third judicial district of the Territory of Dakota, do hereby certify that the above and foregoing is a full, true, correct, and complete transcript and copy of the notice of appeal and proof of the service thereof; of the judgment-roll and of the certificate of the judge in the above-entitled action, and the order overruling the motion for a new trial and the exceptions thereto, signed by the judge, and all orders extending time to the defendant to give notice of intention to move for a new trial in the action wherein Richard Mares is plaintiff and the Northern Pacific Railroad Company is defendant as the same now remains of record in the said court.

In witness whereof I have hereunto set my hand and affixed the seal of said court this 1st day of May, A. D. 1884.

[SEAL.] N. C. MORGAN, *Clerk,*
By E. R. WISWELL, *Dep.*

427 Supreme Court, Territory of Dakota. May Term, 1884.

THURSDAY, *May* 22*nd*, 1884—9th day of term.

Court met at the court-room in the city of Yankton, Dakota Territory, pursuant to adjournment.

Present: Hon. A. J. Edgerton, chief justice; Hons. S. A. Hudson, Wm. E. Church. and C. S. Palmer, associate justices thereof; Hugh J. Campbell, U. S. att'y; Harrison Allen, U. S. marshal, by C. A. Gray, dep'y; L. H. Edding, bailiff; Grant Sharp, crier; B. S. Williams, clerk.

Court being duly opened, the following proceedings were had, to wit:

Appeal from the District Court of Cass County.

RICHARD MARES, Respondent,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Appellant. } No. 174.

428 And now, this 22nd day of May, A. D. 1884, the above-entitled action coming on for argument and hearing, by consent of counsel and the permission of the court, Col. W. P. Clough for the appellant, and Judge Thomas Wilson for the respondent.

And thereupon cause submitted to the court.

429 Supreme Court, Territory of Dakota.

RICHARD MARES
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY.

Whereas the above-entitled action was tried in the district court and a verdict rendered therein on the 29th day of June, A. D. 1883; and whereas, for the accommodation of the defendant's attorney, judgment was not entered therein until the 10th day of April, 1884; and whereas by the laws of Dakota Territory on the entry of judgment the plaintiff was authorized to incorporate therein and make a part of such judgment interest at the rate of seven per cent. on the amount of the verdict from the date of the verdict till the date of the entry of judgment; and whereas by mistake the interest was

430 not so computed or entered in or made a part of such judgment; and whereas the amount of such interest on the verdict from the date of the rendition thereof till the date of the entry of judgment was and is the sum of one thousand and ninety-two $\frac{70}{100}$ dollars ($1,092.70); and whereas it is the agreement and desire of the parties that such mistake may be corrected, and that the same sum of $1,092.70 may be added to the said judgment as of the date thereof:

Now, therefore, it is stipulated and agreed that by an order of the court the judgment herein may be amended as aforesaid; that the judgment so amended and corrected shall hereafter stand as the judgment in the case and shall not hereafter be questioned by either party for or on account of such amendment; and if any appeal is taken from the judgment of the court affirming or reversing such

judgment that it shall be taken from the said amended judgment, and that the said amended judgment shall be sent to the
431 appellate court and treated and considered as the judgment originally entered in the district court.

It is further stipulated that this court shall order the clerk to, and that the clerk shall, on such order, incorporate in the judgment-roll in the case the said amended judgment: Provided, That the right to reverse the judgment shall remain the same as if this amendment had not been made.

THOMAS WILSON,
Pl'ff's Att'y.
W. P. CLOUGH,
Def't's Att'y.

432 [Endorsed:] In supreme court, Dakota Territory. May term, 1884. Richard Mares, respondent, *vs.* The Northern Pacific Railroad Company, appellant. Stipulation to amend the judgment of the dist. court. Filed in open court this 23d day of May, A. D. 1884. B. S. Williams, clerk.

433 Supreme Court, Territory of Dakota. General Term, May, A. D., 1884.

RICHARD MARES
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY.

On the stipulation of the attorneys for the parties in the above-entitled action, filed in this court this day, ordered that the judgment in this action be amended by the clerk of the court by adding thereto the sum of $1,092.70 as of the date of the rendition of the said judgment in the district court, viz., as of the 10th day of April, A. D. 1884, and that the said judgment so amended stand as the judgment of the said district court which rendered the same, and that hereafter the said amended judgment in this and in all other courts shall be held and stand as the judgment of the said district court appealed from, and that neither party shall hereafter question the right to make said amendment or the validity
434 thereof; and that the clerk of this court, if any appeal be taken from the judgment of the court, either affirming or reversing the said judgment, shall return on such appeal as the judgment affirmed or reversed such amended judgment: Provided, That the right to reverse the judgment shall remain the same as if this amendment had not been made.

By the court:
A. J. EDGERTON,
Chief Justice.

435 [Endorsed:] In supreme court, Dakota Territory. May term, 1884. Richard Mares, respondent, *vs.* The Northern Pacific Railroad Company, appellant. Order of court amending judgment of this dist. court. Filed in open court this 23d day of May, A. D. 1884. B. S. Williams, clerk.

436 TERRITORY OF DAKOTA, *County of Cass:*

District Court, Third Judicial District.

At a general term of the district court within and for said county of Cass, in the third judicial district of Dakota Territory, held at the court-house, in the city of Fargo, on the first Tuesday of June, A. D. 1883.

Present: The Hon. S. A. Hudson, presiding judge, and the other officers of said court.

Amended Judgment of the District Court. Judgment for Plaintiff on Trial.

RICHARD MARKS, Pl'ff,

vs.

NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

This action having been tried by jury at the district court held at the court-house, in the city of Fargo, in and for said county, on the 29th day of June, A. D. 1883, before the — S. A. Hudson,
437 judge, and the jury having rendered a verdict for said plaintiff and against said defendant therein for the sum of twenty thousand dollars, and said verdict having been entered in the minutes of the said court:

Now, on motion of Thomas Wilson and Wilson & Ball, plaintiff's attorneys, it is considered and adjudged by the court that said plaintiff recover of the said defendant the sum of twenty-one thousand one hundred and twenty-eight and $\frac{95}{100}$ dollars.

Done in open court this 10th day of April, 1884.

S. A. HUDSON, *Judge.*

Attest: N. C. MORGAN, *Clerk.*

438 THE UNITED STATES OF AMERICA, *Territory of Dakota,* } *ss:*

Be it remembered that at a term of the supreme court of the Territory of Dakota, begun and held at the capital, at Yankton, the seat of government of said Territory, on the second Tuesday of May, A. D. 1884, on the tenth day of the term, to wit, on the 23d day of May, A. D. 1884—present, Alonzo J. Edgerton, chief justice; Sanford A. Hudson, William E. Church, and Cornelius S. Palmer, associate justices of said court—the following proceedings were had, to wit:

Appeal from the District Court of Cass County.

THE UNITED STATES OF AMERICA, } ss:
Territory of Dakota, }

In the Supreme Court. May Term, 1884.

439 RICHARD MARES, Plaintiff and Respondent,

vs.

NORTHERN PACIFIC RAILROAD COMPANY, Defendant and Appellant.

This action coming on to be heard at the May, A. D. 1884, term of said supreme court, at the supreme court room, in the city of Yankton, D. T.—present, A. J. Edgerton, chief justice, and S. A. Hudson, Wm. E. Church, and C. S. Palmer, associate justices—and the appeal herein having been argued by Col. W. P. Clough, for the appellant, and by Col. Thomas Wilson, for the respondent, and the court having advised thereon, it is now here considered, ordered, and adjudged that the judgment of the said district court within and for said Cass county appealed from herein be, and the same is hereby, affirmed.

And it is further ordered that this cause be, and it is hereby,
440 remanded to the district court for further proceedings according to law and the judgment of this court.

And it is further considered and adjudged that respondent have and recover of the appellant his costs and disbursements on this appeal expended, taxed and allowed at thirty-six and $\frac{95}{100}$ dollars.

By the court: A. J. EDGERTON,
Chief Justice Supreme Court D. T.

All the justices concurring.

In Supreme Court, Territory of Dakota, *ss.*

I, B. S. Williams, clerk of the supreme court within and for the Territory of Dakota, do hereby certify that the above and foregoing is a full, true, correct, and complete transcript and copy of the amended judgment, stipulations filed by the respective attor-
441 neys, and of the order and judgment of said supreme court in the above-entitled action, wherein Richard Mares is respondent and The Northern Pacific Railroad Company is appellant, as the same now remains of record in said court.

In witness whereof I have hereunto set my hand and affixed the seal of the said court this 22nd day of May, A. D. 1884.

[Seal of the Supreme Court.]

B. S. WILLIAMS, *Clerk.*

Clerk's fees	$5 95
Printing resp. briefs	11 00
Statutory costs before argument	5 00
" "	15 00
Total	$36 95

442 [Endorsed:] In supreme court, Territory of Dakota. May term, 1884. Richard Mares, plaintiff & respondent, *vs.* Northern Pacific Railroad Company, defendant & appellant. Filed this 23d day of May, 1884. B. S. Williams, clerk. Remittitur.

443 Know all men by these presents that we, the Northern Pacific Railroad Company, by W. P. Clough, its attorney, as principal, and P. H. Kelley and C. W. Griggs, both of St. Paul, Minnesota, as sureties, are held and firmly bound unto Richard Mares in the full and just sum of thirty thousand (30,000) dollars, to be paid to the said Richard Mares, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these present.

Sealed with our seals and dated this twenty-first day of July, A. D. 1884.

Whereas lately, in a suit depending in the supreme court of the Territory of Dakota, between Richard Mares, plaintiff and respondent, and the Northern Pacific Railroad Company, defendant and appellant, a judgment was rendered against the said Northern Pacific Railroad Company, and the said Northern Pacific Railroad Company having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Richard Mares, citing and admonishing him to be and appear at a supreme court of the United States on the second Monday of October next: Now, therefore, the condition of the above obligation is such that if the said Northern Pacific Railroad Company shall prosecute the said writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to
444 remain in full force and virtue.

NORTHERN PACIFIC RAILROAD COMPANY,
By W. P. CLOUGH, *Its Att'y.* [SEAL.]
P. H. KELLY. [SEAL.]
C. W. GRIGGS. [SEAL.]

Signed, sealed, and delivered in the presence of—
E. H. OSMAN.
ET. STEVENSON.

STATE OF MINNESOTA, *Ramsey County,* } ss:

Personally came before the undersigned, a notary public in and for the said county, P. H. Kelly and C. W. Griggs, by me known to be the sureties in the foregoing instrument, and each having been first duly sworn, did depose that he is worth the sum of thirty thousand (30,000) dollars above debts, liabilities, and property exempt from levy and sale under execution.

[SEAL.]

P. H. KELLY.
C. W. GRIGGS.

Subscribed and sworn to before me on this 28th day of July, A. D. 1884.

E. H. ——,
Notary Public, Ramsey Co., Minn.

445 [Endorsed:] Territory of Dakota, supreme court. Richard Mares, respondent, *vs.* Northern Pacific Railroad Co., appellant. Filed July 31st, 1884. B. S. Williams, clerk. Bond. The within bond approved this 31st day of July, 1884. A. J. Edgerton, chief justice supreme court of Dakota.

446 UNITED STATES OF AMERICA, } ss:
Territory of Dakota, }

I, B. S. Williams, clerk of the supreme court of the Territory of Dakota, do hereby certify that the writings annexed to this certificate are true copies of their respective originals on file and remaining of record in my office, and that they constitute a full, true, correct, and complete transcript and copy of the record in the foregoing cause as the same now remains of record in my said office.

In testimony whereof I have caused the seal of the said court to be hereto affixed, at the city of Yankton, in the Territory of Dakota, this 23rd day of September, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the said United States the one hundred and ninth.

[Seal Supreme Court of Dakota Territory.]

B. S. WILLIAMS, *Clerk.*

[Endorsed:] Filed May 23d, 1884.

Endorsed on cover: Dakota Territory supreme court. No. 102. The Northern Pacific Railroad Company, plaintiff in error, *vs.* Richard Mares. Filed 14th October, 1884.

23. 710

Office Supreme Court U. S.
FILED.
OCT 8 1887
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

NORTHERN PACIFIC RAILROAD COMPANY, *Plaintiff in Error,*

vs.

RICHARD MARES, *Defendant in Error.*

(No. 102.)

In Error to the Supreme Court of the Territory of Dakota.

BRIEF FOR PLAINTIFF IN ERROR.

JAMES McNAUGHT,
Counsel for Plaintiff in Error.

WEST PUBLISHING CO., PRINTERS, SAINT PAUL, MINN.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

NORTHERN PACIFIC RAILROAD COMPANY, *Plaintiff in Error*,

vs.

RICHARD MARES, *Defendant in Error.*

(No. 102.)

In Error to the Supreme Court of the Territory of Dakota.

Brief for Plaintiff in Error.

STATEMENT OF CASE.

In the complaint it is averred that the plaintiff was employed as switchman and brakeman in the defendant's switch-yard at Bismarck, Dakota territory, and at said time said defendant employed in said yard, as engineer, Norman A. Bassett; that Bassett was a man of hasty and excitable disposition, and ungoverned, violent temper; that he was reckless, and that he was accustomed to become unduly and dangerously excited and angry, and was accustomed to act and conduct himself in a reckless manner, causing great danger to the brakemen and switchmen; and that at the time of the accident he was, and for a long time prior thereto had been, negligent, unskillful, unfit, and incompetent to act as engineer in said yard,—all of which [illegible] company knew, or by the use of ordinary diligence would [illegible] plaintiff had no knowledge thereof.

In the answer the foregoing allegations are denied, and negligence of said Mares, contributory to the injury, is duly set forth.

(Transcript, pp. 4, 5, 7, 8.)

It is not averred in the complaint that the Northern Pacific Railroad Company was negligent in the selection of said Bassett, nor is it averred that the unskillfulness, negligence, recklessness, unfitness, or incompetency of said Bassett caused or contributed to the injury complained of by defendant in error.

Plaintiff's evidence clearly established his contributory negligence.

DANIEL F. GALVIN,

called as a witness on behalf of plaintiff, among other things testified as follows:

Q. Now, then, Mr. Galvin, you may come to this man Bassett as an engineer. What kind of a man was he?

A. Well, he was a hard man to get along with,—a mean man to work with. He used very poor judgment, and if I checked him up or scolded him for going too fast,—too reckless,—he would go slow; would sneak along so I couldn't do nothing with him; going too slow entirely, just to be mean.

Q. Well, on the contrary, if he was going too slow, what would he do?

A. He would go too fast.

Q. Well, how much too fast? Just explain to the jury in your own way.

A. Well, abusing the engine,—handling her rough; handling the cars rough; *running too fast.*

Q. Well, in doing that, *was it or was it not endangering the safety or lives of those working round him?*

A. *It was. Almost any one,—the best of railroad men.*

Q. You may explain, if you please, Mr. Witness, how long Bassett had been accustomed to behave in this way, and act in this way in that yard.

A. *He did it all the time he was with me.*

(Transcript, p. 66.)

Q. Now, while he was in the yard there under you, while you were night yard-master, I want you to state to this jury whether or not he was *accustomed to be*, and whether or not it was his *ordinary custom to be, negligent and reckless in his conduct there in the yard.*

A. *It was.*

Q. Was it in doing business there that you observed?

A. It was; yes, sir.

Q. *Could any person seeking to discover have observed that and known it?*

A. *They could; yes, sir.*

(Transcript, p. 68.)

Q. Now, Mr. Witness, the first question is not what that reputation was, but do you know what his reputation was as to being reckless, as here stated?

A. I do.

Q. State what it was.

A. My men, some of them, were afraid to work with him. They all talked among my men of his careless way of doing work, stating that they were afraid of him. They were new men—

Q. I am asking you now what was his general reputation. I mean by that what was generally said about him, as to whether he was reckless or not, or careless or not.

A. He was reckless.

Q. *Was that what was generally said? Was that his general reputation?*

A. *Yes, sir.*

Q. *That he was reckless?*

A. *Yes, sir.*

Q. *Was it or was it not his general reputation that he was a dangerous man?*

A. *Yes, sir; it was.*

Q. What kind of a tempered man is this man Bassett in the performance of his duties?

A. He had a very mean temper.

Q. Explain to the jury how that manifested itself there in the yard [illegible] his business.

A. Well, as I said before, if I would scold him for going too fast, he would go too slow. He would be mean about it. If he was going too slow, he would rush things, and take it out of the engine. Well, he would abuse her, abuse the engine; go too fast, tear things around.

Q. For instance, when he was told to make a coupling of cars here, now the cars are coming together, how would he do as to coming together, fast or slow, or at a proper rate of speed?

A. *He would go too fast as a general thing.* Come against the cars very hard at times.

Q. That was when you had been speaking to him about going slow?

A. Yes, sir.

Q. Would he do it in a manner that was reckless and dangerous to those employed with him?

A. He would; yes, sir.

Q. *Well, was he or was he not accustomed to do that?*

A. *He was; yes, sir.*

Q. And the things you told them he did, you say are, as matter of fact, dangerous for those who worked with him?

A. They are; yes, sir.

Q. Would any railroad man have known that?

A. Yes, sir; any man that knows anything about railroading.

(Transcript, pp. 69 & 70.)

Q. Did you warn Mares in any manner, or did you mention to him in any way an opinion that Bassett was a dangerous man as an engineer for him to work with?

A. I might have, and I might not have.

Q. Have you any recollection of anything of that kind?

A. I used to be very careful with all my men.

Q. Well, if you failed to warn Mares, you failed to do your duty, did you in your opinion?

A. I do not know that I did. Mares was a man that worked there before. He knew the yard.

Q. Did you consider Bassett a man that was dangerous to an experienced brakeman?

A. I did. Yes, to a certain extent.

Q. You considered him dangerous to Mares, did you?

A. To a certain extent; yes.

(Transcript, p. 76.)

Q. Were you present at the night of this injury to Mares?

A. Yes, sir; I was.

Q. I wish you would go on, and in your own way explain to the jury how that occurred. * * *

A. He started from the head-quarters, and backed down on No. 3 very rapidly.

Q. Who did?

A. The engineer Bassett.

Q. You say he backed down very rapidly?

A. Yes, sir.

Q. Well, was he or was he not at that time going more rapidly than was prudent or safe?

A. It was very improper to go that way over the switches, and too fast in the yard.

Q. Then you say when he started he started in this way?

A. He started very quick; yes, sir.

Q. Did he do so at once; immediately when he started?

A. Yes, sir.

Q. And told them to go ahead?

A. To go ahead on No. 5, and they pulled up over the switch, and was backing down on No. 5, and he was abusing the engine—

Q. Explain what you mean?

A. Well, he was going as fast as he could go; as fast as he could get her to go.

Q. Well, in the night, at that time, or at any time, was it or was it not safe to go as he was then going?

A. It was very unsafe.

(Transcript, pp. 58, 59.)

Testimony of

JOHN McLEAN,

witness called in behalf of plaintiff, (a brakeman working with defendant in error at the time of the accident, and for two weeks prior thereto:)

Q. What kind of a man was this man Bassett? You were there a good long time that fall. What was his conduct,—reckless, or cautious and prudent?

A. Pretty reckless; pretty smart.

Q. State what it was.

A. Well, that is what I would say,—reckless.

Q. *Well, say, for instance, if he was ever spoken to about going too slow, then what?*

A. *He would run the other way,—fast again.*

Q. *Would he run fast enough to be reckless and dangerous?*

A. *Yes, sir; many times.*

Q. Did you of your own knowledge see that and know that?

A. Yes, sir.

Q. Well, I will ask you whether you saw and know these facts of your own knowledge?

A. Yes, sir; I did.

Q. You did?

A. Yes, sir.

(Transcript, p. 109.)

Q. *Can you give any one instance, prior to the time in which Mares was hurt, in which you observed any recklessness or dangerous handling of cars by Bassett with his engine?*

A. I do not suppose I can give any particular one. *I know he was pretty reckless all that night;* pretty lively.

Q. *Just tell us what he did in the earlier part of the night.*

A. *Well, if he got a signal to back up a car slowly, he would do it the other way.*

Q. *Do you pretend to say that night, whenever any signal was given for him to back slowly, he backed rapidly?*

A. *Yes, sir.*

Q. *Whereabouts in the yard?*

A. *Well, at different places.*

Q. *Did he do it more than once?*

A. *Yes, sir.*

Q. You were with him all that night?

A. All the time he was working.

Q. *Suppose you were at work every night that week, who would be your crew?*

A. *Mr. Galvin, Mr. Brant, and Mr. Mares.*

Q. Did you work with any other engineer, if you worked each night that week, except Bassett?

A. Well, sometimes they changed around. Sometimes would have another, but he was generally our man at night,—Mr. Bassett was.

Q. You say, previous to the time when Mr. Mares was hurt,—in the evening, Mares was hurt,—in the morning previous, *that same evening he had disobeyed orders, running more rapidly than it was his duty to run?*

A. *Yes, sir; many times.*

Q. What was the effect of that?

A. Well, sometimes he would break the draw-head.

Q. *Was it a matter of conversation between Mares and yourself, or Mr. Galvin and yourself, that he was disobeying orders that evening?*

A. *It was between our ownselves, the outside crew. I had said nothing to him that night.* In fact I do not think I ever did check him for running too fast. Mr. Galvin done that himself.

Q. I am speaking about this evening on which this occurrence took place. *You say you talked that among yourselves he was running carelessly that evening?*

A. I do not remember correctly. I do not know whether we did or not that night. *I think we did.* I think we was saying something. He was mad, anyhow—missing couplings, anyhow.

Q. *What do you mean by that?*

A. *Coming back too fast. The man would not step in between the cars to make the couplings.*

Q. Will you say, Mr. Bassett, in the handling of his cars, was any more rapid or sudden in his movements than yard-men are generally?

A. He was a good deal more so than some engineers that was

Q. I am talking about the average engineers in a yard generally. Did he handle the cars any more rapidly than engineers generally in the yard?

A. Yes, sir; he did.

(Transcript, pp. 112, 113, and 114.)

Q. Supposing a man had been supporting himself there upon the brake-beam, or anything else, would such a reversal as you speak of have thrown him off?

A. If he was holding on to something, he would have something to hold on to.

Q. *Don't you consider it dangerous to ride upon the top of cars in switching without some support?*

A. *Well, it is in one respect; yes, sir.*

(Transcript, p. 115.)

RICHARD MARES

called, testified, among other things, as follows:

Q. Did you, or did you not, this fall on which you were hurt, understand the duties of switchman in the yard?

A. I did.

Q. Who were with you in the yard at that time, and in what capacity were they?

A. Well, Mr. Galvin was acting as yard-master at the time. Then there was a man by the name of McLean.

Q. What was he doing?

A. He was brakeman.

Q. Who else?

A. A man by the name of Brant. He was a brakeman also.

(Transcript, p. 15.)

Q. You had been at work here that time how long before you were hurt?

A. About two weeks.

Q. Prior to that time had you known anything of Bassett, the en-

A. Yes, sir.

Q. Where did you know him?

A. He was firing upon the road when I first became acquainted with him.

Q. How much were you acquainted with him before you came here that winter?

A. Scarcely any.

Q. As to his mode of doing business as an engineer, did you know anything about it until you came here that fall?

A. No, sir; I did not.

Q. That fall you were here two weeks, he being night-man one week and day-man the other; then you were with him but about one week before you were hurt?

A. I think so.

(Transcript, pp. 16–18.)

Q. Then, by turning that switch, you could throw the cars from No. 3 track to No. 5?

A. Yes, sir. I threw the switch, and gave him a signal to back up. I then got on the car,—the hind car,—and gave the signal to back up seven or eight cars.

Q. Go on, and state what was done.

A. He backed up about three car-lengths, and reversed his engine.

Q. State whether he backed up rapidly or slowly. How was that?

A. Well, we were backing up middling fast.

Q. Well, did he reverse the engine rapidly or slowly?

A. He reversed it rapidly.

(Transcript, p. 19.)

Q. State what effect it had.

A. It threw me off.

Q. Now, go on and explain to the jury where you were during the time you were backing down, and when this engine was reversed on track No. 5.

A. *I was standing on top of a box car,—the hind car.*

Q. How many cars had you hitched on?

Q. Now, according to the rules of that yard, was it or was it not his duty to obey your signals as given to him?

A. It was.

(Transcript, pp. 20 and 21.)

Witness recalled, testified as to a conversation with Fulton.

Q. State what that conversation was.

A. Mr. Fulton was talking to me about how I came to get hurt, and so on, having a general talk about it; and I told him, as I have told the jury here, that I considered it Basset's fault. And we were speaking about Basset in one way and another. *I told him that he never had obeyed signals properly.* I spoke in this way, that a man would have to give him a signal three or four times before he would pay any attention to it.

(Transcript, p. 232.)

Q. Now, what part of those two weeks did you work with Basset as engineer?

A. Well, I cannot remember. * * * I think I staid with him one week.

Q. Then you worked with him one whole week during the fall of 1881?

A. Yes, sir.

(Transcript of Record, p. 30.)

Q. What was said in this dispute?

A. Well, he did not offer to back up the engine. I spoke to him, and told him *I was in a hurry.*

(Transcript, p. 34.)

Q. Now, whereabouts did you get on the hind car? Which end of the car did you get on,—this end or that end?

A. I got on below the switch.

Q. You climbed up the ladder, didn't you?

A. Yes, sir.

Q. Was it the ladder next to the engine, or the other way, that you climbed onto?

A. Next to the engine.

Q. Then you got on the rear end of the car?

A. Yes, sir.

Q. Where did you take your station?

A. *I walked to the opposite end of the car.*

Q. *Went over and stood in front?*

A. *Yes, sir.*

Q. *Up against the brake-staff?*

A. *No, sir; I was standing on the run-board.*

Q. *How far from the end of the car were you?*

A. *I should judge about three feet.*

(Transcript, p. 36.)

Q. Now, after you got onto this car you say *you stood on the running board about the middle of the car, as I understand you?*

A. *No, sir.*

Q. *Where did you stand?*

A. *I stood near the east end.*

Q. *How far from it?*

A. *About three feet.*

(Transcript, pp. 37, 38.)

Q. Well, did you give any other signals than just to go ahead?

A. No, sir.

Q. Now, was that signal seen the first thing?

A. I think it was.

Q. And obeyed immediately?

A. I think it was. Yes, sir; at that time.

Q. Then you pulled west until you pulled to the switch?

A. I stepped off the switch, and gave him a signal to stop, then I gave him a signal to back up, *and while he was backing up I got onto the end of the car. After I got up on the car he was backing up then, after I got up on the car, I gave him the signal to back up seven or eight cars.*

(Transcript, p. 39.)

Q. After he commenced going back, while the cars were in motion, going east, you climbed up to the top of this car?

A. Yes, sir.

Q. And while the cars were backing, in accordance with your first signal, you gave the second signal to back seven or eight lengths?

A. Yes, sir.

* * * * * * *

Q. How did the reversal of the engine affect these cars on this occasion any different from what it always does whenever an engine is reversed?

A. Well, it depends a good deal on how and in what manner an engine is handled when it is reversed.

Q. As I understand you to say as soon as the reversal of the engine took place, and the speed checked, then you fell off? Isn't that true?—*The speed was so great that it gave them a terrible jerk*—Isn't that true, just as soon as the engine was reversed and the speed checked, you fell off? Isn't that true?

A. Why, as soon as the slack was taken out of the cars; yes, sir.

Q. Will you please tell me what was the difference between the effect of the reversal of the engine on these three cars and the reversal that always takes place under similar circumstances in handling cars, and how were these cars jerked differently than cars are always, naturally?

A. In the first place, *he was handling the engine in a reckless manner, and had been from the time he started the engine in the first place until I was thrown off.*

Q. *Do you mean to say he run too fast, or stopped too quick, or what?*

A. *I mean to say he was running too fast.*

(Transcript, p. 50.)

Q. You say you had already backed five or six car-lengths before you fell off?

A. No, sir; I beg your pardon. After I first give him the signal to back up from where I was standing at the switch, I said perhaps we had moved back five or six car-lengths. At the time I gave him the signal to back ahead seven or eight car-lengths, I was standing on the top of the cars. *In the mean time he had been backing up right along,—was backing up when I got on the car;—but, after I got on top of the car, I gave him the signal to back up seven or eight cars. Then I stepped to the hind end of the car. He backed up about three car-lengths, and he then reversed the engine.*

Q. You turned the switch, didn't you?

A. I did; yes, sir.

Q. That let the cars onto No. 5?

A. Yes, sir.

(Transcript, p. 51.)

Q. *You stated he had been acting recklessly all the evening after you waked him up?*

A. *Yes, sir.*

(Transcript, p. 53.)

Q. *You were standing so near that when the speed was checked you went right on?*

A. *That's what I mean to say; yes, sir.*

(Transcript, p. 43.)

The foregoing, and other testimony introduced on the trial by plaintiff, establishes the following facts:

First.—That engineer Bassett was in the habit of disobeying and disregarding signals and orders, and that on the night of the accident, and prior thereto, he frequently disobeyed the signals given by the brakeman.

Second.—That Mares had full knowledge thereof at and prior to the time of the accident.

Third.—That Bassett was in the habit of running his engine at a reckless and dangerous rate of speed. Plaintiff worked with Bassett for one week prior to the accident. During that week, and on the evening, night, and morning of the accident, he was abusing his engine, and running the same at a rapid, reckless, and dangerous rate of speed, and was at the time the engine and train moved onto switch No. 5 running at a rapid, reckless, and dangerous rate.

Fourth.—That Mares, with full knowledge that Bassett was accustomed to run his switch-engine at a rapid, reckless, and dangerous rate of speed, without complaint to the company, continued in its employment, at work with said engineer, and with the knowledge that the engineer was in the habit of disregarding signals and orders, and that his engine and train was moving at an exceedingly [illegible] and dangerous rate of speed, as the train moved onto

switch No. 5, jumped onto the moving train, and walked to the front end of the car, and with such knowledge assumed a position on the run-board about three feet from the end of the car, with a lantern in his hand, and without holding on to the brake or ladder round, or taking any precaution for his safety or protection, and remained in that position with the knowledge that the train was moving at a rapid, reckless, and dangerous rate of speed, and with the knowledge that the engineer was in the habit of disregarding signals and orders, until the engine was reversed and the accident occured.

Verdict and judgment in favor of Mares, $20,000. Judgment affirmed by the supreme court of territory.

ASSIGNMENT OF ERRORS.

I.

The court erred in overruling the motion of the railroad company, made at the close of plaintiff's testimony, for a non-suit, on the grounds set forth in the Transcript of the Record, p. 128, and hereafter fully quoted in this brief, as follows:

First.—The evidence of plaintiff raises an unexplained presumption of negligence on his part contributing to the injury.

Second.—Mares, by unnecessarily assuming a dangerous position, when there were other convenient, accessible, and safe positions, without heeding his peril, or taking any of the many precautionary measures of safety at hand, was guilty of negligence contributing to the injury.

Third.—Plaintiff, Mares, by remaining in the employment of the railroad company with knowledge that his fellow-servant, Bassett, was hasty and reckless, incompetent, and frequently violated signals and orders, without complaining, and a promise by the company to discharge him, assumed the risks arising from Bassett's recklessness, incompetency, and violation of signals and orders.

Fourth.—There is no evidence that the railroad company had any knowledge of Bassett's recklessness, incompetency, and unfitness as to the matters causing the injury.

Fifth.—If the reversal of the engine by Bassett was, as plaintiff contends, in consequence of the quarrel between plaintiff and Bassett, the act was one of pure malice and wantonness, and not in the line of Bassett's duty, and the company is not responsible therefor.

Sixth.—The plaintiff failed to aver or prove want of care in the selection and retention of Bassett in relation to the particular act causing or contributing to the injury.

Seventh.—Plaintiff, Mares, had control of the speed of the train prior to and at the time of the injury, and, by not requiring Bassett to reduce it from an unsafe to a safe rate, he was guilty of negligence proximately contributing to the injury.

II.

The court erred in not sustaining the demurrer of the defendant to the evidence at the close of the testimony, and in not instructing the jury to find for the defendant upon the grounds:

First.—For the reasons set forth in this brief under nonsuit.

Second.—Plaintiff's cause of complaint was not the reversal of the engine, but the reversal without shutting off steam. The plaintiff's evidence upon that question was not sufficient to create a conflict.

Third.—Plaintiff was guilty of negligence proximately contributing to his injury, by unnecessarily taking a position on the box car, moving at a reckless rate, within three feet of the end of thereof, without taking hold of the ladder, or brake, or bracing himself.

III.

The court erred in instructing the jury as to the burden of proof, which instructions are set out in full in the Transcript of Record, pp. 239, 240, for the reasons set forth under the third point in this brief.

IV.

The court erred in giving the instruction found on p. 237 of the Transcript of Record, and quoted in full under the fourth point in this brief, for the reasons:

First.—Said instruction is misleading. The jury might infer therefrom that carelessness of the fellow-servant was the only risk the plaintiff assumed in entering into his employment.

Second.—The plaintiff assumed, in addition to the ordinary and incidental risks, latent defects in machinery, and negligence of employer in the selection and retention of employes, if the defects and negligence of the employer were known to the employe.

V.

The court erred in giving the instruction found on p. 238 of the Transcript of Record, and quoted in full under the fifth point made in the argument in this brief, for the reasons:

First.—The jury, under said instruction, might well find that Mares was justified in relying upon the presumption mentioned in said instruction, notwithstanding he had positive proof to the contrary.

Second.—The phrase "proper diligence," used in said instruction, is indefinite.

VI.

The court erred in giving the instruction found on p. 241 of the Transcript of Record, and quoted in full under the sixth point in this brief, for the reasons:

First.—If the railroad company was negligent in selecting or retaining Bassett, and the plaintiff had full knowledge of such carelessness and recklessness, and remained in the employ of the company without complaint and a promise to discharge, he was guilty of the same degree of negligence as the company. It was error to say that the company was negligent, and that the plaintiff, with full knowledge thereof, might not be negligent.

Second.—It is not sufficient, as averred in the instruction that the plaintiff report the facts establishing the carelessness and negligence of the employe to the company. There must be a promise to discharge, and the accident must have occurred within a reasonable time after such a promise.

VII.

The court erred in giving the instruction found on p. 235 of the Transcript of Record, and quoted in full under the seventh point in this brief, for the reasons there stated.

POINTS AND AUTHORITIES.

I.

At the close of plaintiff's testimony the counsel for defendant moved the court to dismiss said action on the following grounds:

"*First.*—That he had failed to establish that he was hurt through the negligence of Bassett.

"*Second.*—That he had failed to show any want of ordinary care on the part of the railroad company, the defendant, in the selection of Bassett as its employe for running that switch-engine.

"*Third.*—That it had been clearly made to appear that he (Mares) was negligent on his part in a number of different ways; that he had been guilty of negligence on his part, which contributed and tended directly to his hurt."

Court erred in overruling said motion for the following reasons:

First.—The evidence of plaintiff raises an unexplained presumption of negligence on his part, contributory to the injury.

"In all those jurisdictions where contributory negligence is held a matter of defense, *whenever the plaintiff's own case raises a presumption of contributory negligence, the burden of proof is immediately upon him. In such a case it devolves upon plaintiff, as of course, to clear himself of the suspicion of negligence that he has himself created. He must make out his case in full, and, where the circumstances attending to the injury were such as to raise a presumption against him in respect to the exercise of due care, the law requires him to establish affirmatively his freedom from contributory fault; and when the plaintiff's own case, on the face of it, shows contributory negligence, there should be a nonsuit.*"

Beach on Contributory Negligence, p. 432.

"When the plaintiff's own case exposes him to suspicion of negligence, then he must clear himself of such suspicion."

Wharton on Law of Negligence, sec. 426.

"Where negligence is the ground of an action, it devolves upon the plaintiff to trace the fault for his injury to the defendant, and for this purpose he must show the circumstances

If from these circumstances it appears that the fault is mutual, or, in other words, that contributory negligence is fairly imputable to him, he has, by showing them, disproved his right to recover."

Cooley on Torts, p. 673.

"In those states where the doctrine obtains that contributory negligence on the part of the plaintiff is a matter of defense, if his case raises an inference of negligence on his part, he must, in order to make out a prima facie case, show that he was guilty of no negligence."

Thompson on Negligence, p. 1178, sec. 24.

"And the conclusion is reached, from an examination of the cases, that in those states where it is the rule that the burden of proving contributory negligence is on the defendant, whenever the plaintiff's case raises an inference of contributory negligence, the burden is upon him."

Whittaker's Smith on Negligence, p. 383, note.
Pierce on Railroads, pp. 298, 299, 300.
2 Rorer on Railroads, pp. 1023, 1024, 1025.
Addison on Torts, § 586.
15 Western Jurist, p. 529.

CALIFORNIA.

Robinson et al. v. Western Pacific Railroad Co., 48 Cal. 426.
Nahrbras v. Central Pacific Railroad Company, 14 Am. & En. R. R. Cases, pp. 670, 673.

WISCONSIN.

Kelley et al. v. Chicago & N. W. R. R. Co., 19 N. W. Rep. p. 522.
Schultz v. Chicago & N. W. R. R. Co., 67 Wis. 616.
Hoth v. Peters et al., 55 Wis. pp. 411, 412.
Prideaux v. City of Mineral Point, 28 Am. Rep. 558.

TEXAS.

Dallas, Wichita, etc., R. R. Co. v. Spiker, 48 Am. Rep. p. 298.
Texas, etc., R. R. Co. v. Murphy, 46 Texas, 356.
R. R. Co. v. Cowser, 57 Texas, p. 293.

NEW JERSEY.

New Jersey Ex. Co. v. Nichols, 33 N. J. L. p. 434.
Moore v. Central, etc., R. R. Co., 24 N. J. L. p. 268.

NEBRASKA.

City of Lincoln v. Walker, 20 N. W. Rep. p. 113.

KANSAS.

Kansas Pacific R. R. Co. v. Pointer, 14 Kansas, 37.

OHIO.

Baltimore, etc., R. R. Co. v. Whitacre, 35 Ohio St. p. 627.
Robison and Weaver v. Gary, 28 Ohio St. p. 241.
Street R. R. Co. v. Nolhenius, 19 American & English R. R. C., 191.

VIRGINIA.

Norfolk, etc., R. R. Co. v. Cottrell, 3 S. E. Rep. pp. 123, 127.

KENTUCKY.

Paducah & Memphis R. R. Co. v. Hoehl, 12 Bush, 44.

RHODE ISLAND.

Cassidy v. Angell, 34 Am. Rep. p. 690.

PENNSYLVANIA.

Hays v. Gallagher, 72 Penn. St. p. 140.
Beatty v. Gilmore, 16 Penn. St. 463.

MINNESOTA.

Hocum v. Peter Weitherick, 22 Minn. p. 152.

NEW HAMPSHIRE.

Winship v. Enfield, 42 N. H. p. 197.

COLORADO.

Denver, S. P. & P. R. R. Co. v. Pickard, 2

MARYLAND.

Northern Cent. R. R. Co. v. State, 31 Md. 357.

MISSOURI.

Miller v. St. Louis & American R. R. Co., 5 Mo. App. p. 471.
Buesching v. St. Louis Gaslight Co. 73 Mo. 219, S. C. 39 Am. Rep. p. 503.

FEDERAL COURTS.

Daub v. Northern P. R. Co. 18 Fed. Rep. 625.
Dunmead v. American Mining & Smelting Co., 4 McCrary, p. 244.
Holland v. C., M. & St. P. R. R. Co., 5 McCrary, p. 549.
Schofield v. C., M. & St. P. R. R. Co., 8 Federal Reporter, p. 488.
Cullens v. Davidson, 19 Fed. Rep. p. 83.
Graville v. M. & St. L. R. R. Co., 10 Fed. Rep. p. 711.
Delger v. City of St. Paul, 14 Fed. Rep. p. 567.
R. R. Co. v. Gladmon, 15 Wallace, p. 401.
Ind'p'l's R. R. Co. v. Forest, 93 U. S. p. 291.

Second.—Plaintiff, with knowledge that the train was moving at a reckless and dangerous rate of speed, in a switch-yard where the engine was frequently stopped by reversing it, and with knowledge that Bassett was angry, and in the habit of violating signals and orders, unnecessarily selected a dangerous position on the top of the box car, and within three feet of the end thereof, and remained in that position, standing on the run-board, until the accident. He ought to have stood near the middle of the car, or protected himself by holding onto the brake-beam or ladder-round, or have signaled the engineer to slacken speed from a dangerous to a safe rate, or have walked, as is customary for persons filling the double positions of brakeman and switchman in the switch-yard. Mares, by unnecessarily assuming such a dangerous position without heeding his peril or taking any of

the many precautionary measures of safety at hand, was guilty of negligence contributing to his injury.

Transcript of Record, pp. 22, 23, 36, 37, 38, 41, 51, 60, 80, 105, 115, 116, 122, 125, and 126.
Pierce on Railroads, p. 379.
Railroad Company v. Jones, 95 United States, p. 439.
Davis v. The Detroit & M. R. R. Co., 4 American Reports, 364.
Heydin v. S. Manuf. Co., 29 Connecticut, 559.
M. R. & L. E. R. R. Co. v. Barber, 5 Ohio St. 563–5.
Leary v. Boston, etc., R. Co., 2 Northeastern Rep. 115.

Third.—The plaintiff, by remaining in the employment of the railroad company with knowledge that Bassett was hasty, reckless, and incompetent, and frequently violated signals and orders, without complaint and a promise by the company to discharge him, assumed the risks arising from such causes.

Schultz v. The Chicago & N. R. Co., 67 Wisconsin, 616.
Hughes v. Winona & St. Peter R. Co., 27 Minnesota, 137.

Fourth.—The act of Bassett, proximately contributing to plaintiff's injury, was the reversal of his engine without a signal or order so to do. There is no evidence tending to establish that he had reversed his engine prior to the accident without a signal or order; and nothing in the record tending to bring notice home to the company that he ever violated orders or signals. It is not sufficient to prove knowledge by the company of Bassett's recklessness, incompetency, and unfitness in respect to other matters.

Fifth.—The act of Bassett in reversing his engine was either a positive act of pure malice and wantonness, or it was rightful. If he reversed it because of the quarrel or dispute which he had something like a half an hour before with the plaintiff, then it belongs to the same category as a blow struck in anger, and the company is not liable for the consequences thereof. But if the engineer thought he had backed his train the seven or eight car-lengths, according to the signal given him by the plaintiff, and it was his duty to slacken speed, and he reversed, as it was the custom in the yard, then the company was not liable.

(Transcript of Record, p. 125.)

Sixth.—The plaintiff failed to show any want of ordinary care on the part of the railroad company in the selection of Bassett as engineer, in relation to the particular act causing or contributing to the injury.

Seventh.—Plaintiff, and all witnesses testifying for him, say that the plaintiff had control of the speed of said switch-engine and train; that Engineer Bassett in relation thereto was entirely subject to his order, and especially while said train was moving on switch No. 5. Said plaintiff also testifies that the said train at that time was moving at a reckless and rapid rate. If the speed had been reasonable, the concussion caused by reversing the engine would not have been so great. The excessive rate of speed necessarily contributed to the fall of plaintiff. Judge Hammond, in the case of Smith v. Memphis & L. R. R. R. Co., 18 Fed. Rep. p. 308, says:

"If you believe that on this occasion Davis was under the control of the plaintiff, and bound to act as he was directed, and that the speed was under plaintiff's control, through his power to forbid Davis to run at that rate of speed, and that the rate of speed was so excessive as to either cause or contribute to the accident, the plaintiff cannot recover."

See, also,

Ferguson v. Central Iowa R. Co., 12 Northwestern Rep. 293.

II.

Upon the close of the testimony, defendant demurred to the evidence, and requested the court to dismiss said action on the following grounds:

"*First.*—Because the evidence shows clearly and fully that the plaintiff has contributed to the injury complained of.

"*Second.*—Because the evidence fails to show that the defendant is guilty of any negligence by or on account of which the plaintiff sustained the injury of which he complains.

"*Third.*—Because the evidence fails to show that the defendant has not used ordinary care in the selection of the engineer, Bassett, through whose negligence it is alleged the plaintiff sustained this [illegible] question.

"*Fourth.*—Because the evidence clearly and conclusively shows that the plaintiff not only had the means of knowing, but actually did know, of the character of the engineer, Bassett, of whom he complains, and of his fitness for that employment, and that he made no complaint of Bassett or of his unfitness to his superior officers, but continued, having such knowledge, and the means of knowledge, in the employment of the company in connection with the said Bassett, who was then and there a fellow-servant."

The defendant's counsel also moved the court to instruct the jury to find a verdict for the defendant.

Both of said motions were by the court refused, and said rulings are assigned as error—

First.—For the reasons set forth in this brief under nonsuit.

Second.—The plaintiff concedes that the engineer had the right to slacken the speed of his engine if he thought he was moving at too great a rate of speed when he had run seven or eight car-lengths.

(Transcript of Record, p. 51.)

Galvin and McLean, the only witnesses called by the plaintiff, and the defendant's witnesses, all testify that the engineer had the right to slacken speed whenever he thought the rate too great.

(Transcript of Record, pp. 80, 125, 139, 141, 150.)

In the yard in question, and all other switch-yards, the usual way of stopping or slackening the speed of a switch-engine is by reversing, and not by the use of brakes.

(Transcript of Record, pp. 41, 125, 133, 135, 136, 151, 163.)

Plaintiff does not complain of the reversing of the engine, or slackening the speed, but does complain of the manner of doing it, to-wit: Reversing without first shutting off the steam. Plaintiff at the time of the accident was one-hundred feet from the engine, Galvin was two hundred feet, and, as experts, they testify that, "judging from the sound, the engine was reversed without shutting off the steam." They are not engineers, and they do not say that they were listening or paying any attention.

McLEAN,

the only other witness testifying upon the subject, says:

Q. What you say was done there in regard to reversing the engine, you know by sound and feeling?

A. Yes, sir; I didn't see him do it, of course.

Q. For all you know, could you state that the steam was not then shut when he reversed that engine?

A. I could tell pretty near.

Q. Isn't it a fact that after the steam has been shut off the cylinder remains full of that steam that is in there?

A. Yes, sir; it does, providing she don't make any revolutions.

Q. Isn't it true that whenever the throttle-valve is closed it leaves all the steam that's outside the steam-pipe and cylinders full?

A. Yes, sir.

Q. You answer, yes; that when the throttle-valve is closed then the steam-pipe remains full of steam?

A. Yes, sir.

Q. And the steam-chest and cylinders?

A. Yes, sir.

Q. Now, suppose the wheels of the locomotive do not revolve any when the steam is shut off sudden?

A. Of course the steam-pipes, cylinders, and chests are full of steam. She makes one revolution, and it escapes.

Q. After that steam is in there, after it is shut off, it is still at a higher pressure than it is on the outside, in there?

A. Well, I am not prepared to say.

Q. Doesn't it have to exhaust after the steam is shut off?

A. Yes, sir.

Q. How many exhausts would there have to be before those steam-chests can be emptied?

A. Four.

Q. There would have to be four exhausts?

A. Yes, sir; to empty the steam-chests and cylinders.

Q. So, notwithstanding the steam had been shut off, there would be four exhausts before the steam would be all out?

A. [illegible] would take it pretty near all out.

Q. Now, suppose the steam is closed off, there would then be four exhausts, and the valves reversed so as to reverse the engine, wouldn't there still be a few exhausts, notwithstanding the steam was shut off?

A. Yes, sir; according as it was wasting and escaping away, a very little.

Q. But there would still be an exhaust?

A. Yes, sir; a very slight one.

Q. Are you willing to swear that the steam, at the time that the reversal of this engine took place, had not been shut off?

A. Well, I couldn't swear that it was or wasn't. I know it was very strong; it was quite a shock.

Q. Now, wasn't the exhaust of that engine very strong and peculiar?

A. Yes, sir.

Q. Now, might this not be true that, before the engine was reversed, the steam was shut off, and the engine wasn't reversed, the lever wasn't pulled back, until after the steam was shut off?

A. Well, it might and it might not.

Q. You will not pretend to say that it was not?

A. Well, no; I couldn't swear that it was not, but, to the best of my knowledge, I don't think it was.

Q. *Of course you only give it as a matter of opinion?*

A. *Only an idea.*

Q. *You might be mistaken?*

A. *I might be mistaken, of course. I was not in the engine.*

(Transcript of Record, p. 119, 120.)

ENGINEER BASSETT,

the only person who had any personal knowledge of the subject, testifies as follows:

Q. You reversed your engine without steam, you say?

A. She was shut off. Had been four or five cars. I reversed the engine, and let her slack down to what I thought was right, and then put her back; reversed her back.

Q. What do you mean by putting her back [illegible]

A. Put her in the back motion. She was running in the back motion; I reversed her ahead.

Q. You reversed your engine, and she had been running three or four cars without steam?

A. Yes, sir.

Q. You reversed your engine, and that reduced the motion, did it?

A. Yes, sir.

Q. Was there any steam in the cylinders?

A. No, sir.

Q. The cylinders, when an engine is reversed, act as an air-pump, and the pressure of the air retards the engine?

A. Yes, sir.

Q. That is what you relied on to slacken in this case?

A. Yes, sir; always acts that way.

Q. The reversal of the valves would make the cylinders act as an air-pump?

A. Well, it does.

Q. And the pressure of the air in the cylinders—

A. Slackens the speed.

Q. Then you say, after that had been done, how far had you run after reversing the engine before you put it on the other way where it was originally?

A. Well, I couldn't say. Probably about a car-length; just about enough to slacken them up so there wouldn't be any danger, supposing we struck. I didn't know where the cars were, and I was very certain that he didn't, because he hadn't been down there. We hadn't been on that track that evening that I remember of.

(Transcript of Record, pp. 133, 134.)

Plaintiff's evidence upon the question as to whether the engine was reversed without shutting off the steam was not sufficient to create a conflict.

Telfer v. Northern R. R. Co., 30 New Jersey Law Reports, p. 194.

Culhane v. New York Central & Hudson River R. R. Co., 60 New York, 133.

Tucker v. Duncan, 6 American & English Railroad Cases, p. 268.

Third.—Plaintiff, Mares, testifies that soon after he had his dispute with Bassett, and when the train was moving at a reckless rate of speed, he mounted the box car, walked to the front end thereof at a time when he might have taken a safe position near the middle of the car, and stood upon the run-board within three feet of the end of said car without taking hold of the ladder or brake; and that he assumed that dangerous position with knowledge that the train was moving at a reckless rate of speed, and that Bassett had a violent temper, and was at that time angry. The effect of Mares' testimony is that he heedlessly assumed and remained in a confessedly dangerous position, thoughtless of the risk he was taking. He further says, on page 50, transcript of record, speaking of Bassett: "*In the first place he was handling the engine in a reckless manner; had been from the time he started the engine in the first place until I was thrown off. * * * I mean to say he was running too fast.*" On page 53 he also testifies:

Q. *You stated that he had been acting recklessly all the evening after you woke him up?*

A. *Yes, sir.*

On page 232: "*I told him that he* (Bassett) *never had obeyed signals properly.*"

The defendant supplemented this with proof that it was negligence for brakemen to stand on the run-board of a moving switch-car, within three feet of the end thereof, without taking hold of the ladder round or brake, or bracing himself, or taking some precaution for his safety.

LEVI GREER

testified as follows:

Q. I want you to state to me how you would have him stand on top of the car to be perfectly safe.

A. *When he gets on top he stands in a brace which would brace sideways or any ways, whatever position you happen to get in.*

Q. Now, suppose he braced sideways, in this way, and the car was stopped real quick, how quick would he go off, do you think?

A. *He would not go off at all; if he had any bracing at all he wouldn't.*

Q. I am speaking to you of your direct examination. Now, he would have a right to expect anything, most?

A. Yes, sir; that is exactly what he would have a right to,—a sudden stop, or to go ahead fast.

Q. Very well, if he braces himself for a sudden stop, he braces himself one way, don't he?

A. *It don't make any difference which way; if he is braced, he is braced for anything,—the same position. If I stand here on top of a train, I can ride here, and you can jerk them just as fast as you want to.*

Q. *You could jerk the engine, then, just as fast as you wanted to, and you could stand there?*

A. *Yes, sir.*

Q. Now, do you think there is another man in the world that could do that?

A. Yes; lots of them.

(Transcript of Record, p. 172.)

Q. Now, suppose he does get up on a car, and stand, has he any right to suppose at any time that the engine may not be suddenly stopped or started, or the speed suddenly increased?

A. Well, he ought to expect it.

Q. Has he any right not to expect it?

A. No.

Q. State whose duty it is in respect to being prepared for sudden stopping or checking the speed at any time.

A. Well, the way it is with myself, I am on the lookout for it.

Q. Suppose he does not see, has he a right to get up there, and stand on top of the car, without being prepared at all times for a sudden stopping and starting of the engine?

A. Take a railroad man, standing on top of a car, he always stands in a position all ready to prepare himself; stands that way, *always prepared on top of the car, with one foot before the other.*

Q. You understand that to be your duty, do you?

A. That is a practice of railroad men standing on a train; yes, sir.

Q. Can they tell when the speed of a car may be suddenly checked or suddenly increased. Is it not liable at any or all times?

A. Yes, sir; it is liable to be at any time.

Q. Is not that something that a man has a right to expect on top of a moving car in the yard?

A. To get shook up; yes, sir.

Q. *Suppose a man would get up on a car being moved in the yard by a switch-engine, without being prepared for anything of that kind, would that be good usage and diligence, or would it be the contrary? Would it be negligence?*

A. *Well, it would be carelessness on his part, I think. I know a man is always counted careless if he gets jerked off a train, wherever I have switched.*

Q. *It is always regarded as being occasioned by a want of care?*

A. *Yes, sir.*

Q. Is that your understanding of it?

A. My understanding is, whenever I am on top of a train, to look out for a stop.

(Transcript of Record, pp. 181, 182.)

C. H. BAKER

testified as follows:

Q. I am talking about the duty of a man on top of cars being switched in this yard,—whether it is his duty to look out and expect sudden shocks and starts.

A. Why, most certainly, a man on top of a train switching, where the reverse is used,—the engine is used to stop the train,—he may expect to be jerked and jolted at any time with a short stop.

Q. Has he a right to stand on top of moving cars in the yard without being prepared for such an emergency at any time?

A. He most certainly should be.

(Transcript of Record, pp. 191, 192.)

This evidence establishes that, if plaintiff had braced himself by placing his feet as brakemen usually do when on top of a moving car, he would not have fallen. Experiments were made with a train consisting of an engine and three cars, run at from 12 to 15 miles an hour, with brakemen standing on top of a box car as plaintiff was in this case. The engine, at the speed mentioned, which was much faster than the train carrying plaintiff was running at the time of the accident, was suddenly reversed, and witnesses on the trial [illegible]

they could not see that the sudden jerk had any perceptible effect on the brakemen.

Plaintiff offered no evidence upon this proposition. It must be treated as an established fact in this case that it was negligence in plaintiff proximately contributing to his injury to take such a dangerous position without bracing himself, or taking some measure for his protection. Under such a state of facts, the negligence of Mares himself is too plain to admit of a single doubt. It was not a case where the alternative presented itself of an employe quitting the employ altogether, or assuming the risks of a manifestly dangerous situation for the time being. So far as the employment of these cars was concerned, Bassett was the subordinate, and Mares the man in authority. Mares, when he mounted the car, was perfectly aware of the reckless and dangerous frame of mind in which Bassett was at the time; and also of the fact that the cars were then being handled in a way full of peril to any one working about them. He had the power, had he seen fit to exercise it, to call Bassett to a halt, and stop him entirely, before mounting the car. There was not the slightest excuse for permitting Bassett to continue at the reckless rate of speed at which he had started. Mares must have been perfectly aware of the extraordinary peril he assumed by taking the position he did on top of the car, under the circumstances. When he took that position he assumed all the perils plainly and necessarily involved in so doing. It will not do to say that Mares may not have anticipated that Bassett would suddenly reverse his engine. He well knew that Bassett was then and had, during all the evening, been abusing his engine; and he had every reason to momentarily expect the happening of an accident of some kind that could not help but result seriously to those at work about the engine and cars. It would be impossible to imagine the exercise of greater or more useless foolhardiness than Mares exhibited on this occasion, taking his own account of it as true. Of course, the law will not permit the employer to be saddled with the consequences of such gross negligence on the part of his employe.

See Railroad Co. v. Troesch, 57 Ill. 175.

Justice Miller, in the case of Cunningham v. C., M. & St. P. R. R. Co., where the brakeman unnecessarily assumed a dangerous position, and was injured in consequence thereof, held that he was guilty of negligence contributing to his injury as a matter of law, and among other things said:

"He has got to take care of himself as well as the railroad has got to take care of its duties and its employes. These obligations are mutual. It is your duty to require it, as the law, that if a man voluntarily puts himself into a dangerous position, does so unnecessarily, when there are other positions in connection with the discharge of his duty which are safe, which he can be placed in, he cannot recover of the railroad company for damages for that injury to which he has contributed by his own negligence."

5 McCrary, p. 465.

Railroad Company v. Jones, 95 U. S. 439.

III.

The instructions given by the court upon the subject of the burden of proof at the request of the plaintiff, and also of its own motion, were clearly wrong.

The rule, that the burden of proof, upon the question of contributory negligence, belongs to the defendant, only goes to this extent: where the evidence adduced on behalf of the plaintiff raises no presumption or suspicion of negligence on his part. But surely the evidence on the part of the plaintiff here, if it does not conclusively show negligence on his part, contains features from which any jury would be entirely justified in finding such negligence. Hence the instructions given by the court were inapplicable and erroneous. Framed in the form in which they were given, they undoubtedly misled the jury. A jury of laymen, from the peculiar terms of these instructions, would very likely be led to think that it devolved on the defendant to make out the defense of contributory negligence by evidence adduced wholly by the defendant itself. A proposition the incorrectness of which would, of course, be admitted.

See authorities under title "Non-suit."

IV.

The court gave the following instruction at the request of the plaintiff, to-wit:

"This plaintiff, when he voluntarily entered into the employ of the defendant, took the risk of dangers ordinarily attending or incident to the business in which he was employed, including the perils arising from carelessness of his fellow-servants."

This instruction is erroneous for the reasons:

First.—It is misleading. The jury might readily infer therefrom that carelessness of the fellow-servant was the only risk that the plaintiff assumed in entering into his employment. "The mention of carelessness is the exclusion of recklessness."

Second.—The employe assumes, in addition to "the risk of dangers ordinarily attending or incident to the business," risks from latent defects in machinery, and negligence of employer in selecting fellow servants, known to its employe.

Lanning v. New York Central R. R. Co., 10 American Reports, p. 417.

3 Woods, Railway Law, pp. 1454–1456, 1481, 1508, 1509.

V.

The court, at the request of plaintiff, gave the following instruction:

"The plaintiff had a right to suppose and assume that the railroad company had used proper diligence and care in the employment and retention of an engineer."

It is error for the reasons:

First.—The plaintiff testified that Engineer Bassett was reckless, abused his engine, ran the train at a reckless rate of speed, was in the habit of violating orders and signals. The jury, under this instruction, might well find that plaintiff was justified in relying upon the presumption mentioned in the instruction, notwithstanding his knowledge of facts tending to prove the contrary.

"The jury ought not to be instructed in such terms as would justify [illegible] acting upon the mere presumption of the absence of fault

in either party, in disregard of the proof in the case, where there are facts and circumstances to be considered by them."

Phila., Wilmington & Balt. R. R. Co. v. Stebbing, 19 American and English R. R. Cases, p. 36.

Second.—The phrase "proper diligence," used in this and other instructions given by the court, is indefinite.

Chicago, etc., R. R. Co., v. Robinson, 106 Illinois, p. 142.

"The requirements of the law, moreover, proceed beyond the featureless generality that one must do his duty in this respect, or must exercise ordinary care under the circumstances."

Beach on Contributory Negligence, pp. 191–192, 195.
Schofield v. C., etc., R. R. Co., 2 McCrary, p. 268.
Schofield v. C., M. & St. P. R. R. Co., 114 U. S. p. 615.
R. R. Co. v. Huston, 95 U. S. p. 697.

VI.

The court of its own motion gave the following instructions:

"It is also true that, if the plaintiff had full knowledge of the reckless and careless habits of the engineer, Bassett, as complained of by him, or had reason to know of such recklessness and carelessness, he should either have quit the service, or reported the facts to the officers of the company having the power to discharge him, and a failure to do so might be negligence on his part. But, gentlemen, it is for you to say, from all the attending circumstances, whether he was neglectful in that regard."

"While this rule of law above stated is generally true, a reasonable view must be taken in its application here. The evidence tends to show that this plaintiff had been at work in this yard but a short time, and only part of that time with or under this engineer, Bassett. Now, had he such knowledge, or had he such an opportunity to know of the reckless and careless habits of Bassett, that rendered it dangerous for him to work with him, and made it his duty to have refused to continue in such service, or have reported him to the officers of the company?"

These instructions are misleading and erroneous for the following reasons:

First.—If Bassett was reckless and careless to such an extent as to make the company liable to the fellow-servant, and the fellow-servant had *full knowledge of such carelessness and recklessness*, then it was negligence for the plaintiff to continue in the employment with said careless and negligent engineer, without a complaint to the company, and a promise of the company to discharge said engineer. It was error to say that the company was negligent in the selection and retention of Bassett, and *that it might not be negligence in the plaintiff, who had full knowledge of such recklessness and carelessness, to remain in said employment.*

"Whenever an employe discovers anything affecting the safety of the machinery or appliances which he is obliged to use, or the fitness and competence of the servants with whom he is associated, it is his duty to inform his employer at once of the fact. He cannot be silent and escape the consequences. Failure to speak promptly is such contributory negligence as will bar a recovery from the master, in case he is injured by the defect in the machinery or the unfitness of the servant. That the servant in such case has lost his right of action is conceded, but the authorities disagree somewhat as to whether it should be put upon the ground of waiver or contributory negligence."

Beach on Contributory Negligence, p. 372, and notes 1 and 2.
Jackson v. K., C. L. & S K. R. Co., 3 Pacific Rep. 501.

Second.—"It is not sufficient that the plaintiff report the facts establishing the carelessness and recklessness of the co-employe to the company having power to discharge him to warrant the employe remaining in the employment. There must be a promise to discharge, and the accident must have occurred within a reasonable time after such a promise."

Clark v. St. Paul, etc., R. R. Co., 28 Minnesota, 128.
Beach on Contributory Negligence, pp. 369, 370, 371, 372, and authorities there cited.

The second instruction, above quoted, does not correct the errors contained in the first. The obligation of the servant to use ordinary care to prevent and avoid injury to himself is correlative to the duty of the master to exercise ordinary care not to expose him to danger. The servant is under no less obligation to provide for his own safety than the master is to provide it for him. The measure of his duty is ordinary care, and, unless he exercise that in good faith, his conduct is negligent. The instruction assumes that the company was negligent in selecting and retaining Bassett; that the plaintiff had full knowledge thereof; and that it was not negligence for him to continue in the employment with such negligent servant without complaining to the company, and a promise to discharge him. The rule here enunciated is that less diligence is required of the servant than of the company; that his obligation to protect and care for himself is not as great as that of the company for him.

Reins v. St. Louis, etc., R. Co., 36 Am. Rep. 459.

Chicago, etc., R. Co. v. Clark, 15 American & English R. C., 261.

Umback v. Lake Shore & M. S. R. Co., 8 American & English R. C. 98.

Smith v. K. C. & N. R. Co., 33 American Rep. 484.

VII.

Defendant's counsel requested the court to give the following instruction, to-wit:

"If the plaintiff knew, or had the opportunity of knowing, before his fall from the car in question, that Bassett was an unfit and an unsafe man to run the engine in question, in that case it was the plaintiff's duty to refuse to work with him any longer, and his failure to do so would prevent him from recovering in this suit."

The refusal is error.

"When an employe, after having an opportunity to become acquainted with the risks of his situation, voluntary accepts them, he cannot complain if he be subsequently injured by such exposure."

Umback v. Lake Shore & Mich. Southern R. R. Co., 8 American & English Railroad Cases, p. 98.

Smith v. St. L., etc., R. R. Co., 33 American Rep. p. 434.

Raines v. St. L., etc., R. R. Co., 36 American Rep. p. 459.

Kelly v. Silver Spring Co., 34 American Rep. p. 615.

Gilson v. Erie R. R. Co., 63 New York, 449.

1 American & English Railroad Cases, p. 108, note.

McGlynn v. Brodie et al., 31 California, 377.

Stone v. Oregon City Manufacturing Co., 4 Oregon, p. 59.

Kansas Pacific R. R. Co. v. Peavey, 8 Pacific Rep. p. 98.

Jackson v. Kansas City, L. & S. K. R. R. Co., 3 Pacific Rep. p. 501.

Day v. Toledo, etc., R. R. Co., 2 American & English Railroad Cases, p. 126.

Youll v. Sioux City & Pacific R. R. Co., 21 American and English Railroad Cases, p. 589.

JAMES McNAUGHT,
Atty. for Plff. in Error.

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SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 102.

THE NORTHERN PACIFIC RAILROAD COMPANY,
PLAINTIFF IN ERROR,
VS.
RICHARD MARES, DEFENDANT IN ERROR.

BRIEF OF DEFENDANT IN ERROR.

THOMAS WILSON,
Counsel for Defendant in Error.

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 102.

THE NORTHERN PACIFIC RAILROAD COMPANY,
Plaintiffs in Error,

vs.

RICHARD MARES,
Defendant in Error.

The plaintiff below was on the 31st day of October, A. D. 1881, employed in the yard of the defendant at Fargo, as brakeman, aiding in switching cars, making up trains, etc. While so engaged he was by the fault and carelessness of the engineer on the switch engine thrown from the top of a freight car and run over by the moving train, and so badly injured that both of his legs were

necessarily amputated. He was otherwise seriously injured. (Record page, 23, 24, 25.) The negligence of the defendant, complained of, was in employing and keeping in its service one Bassett, a careless, reckless and incompetent engineer, on the switch engine used to move the cars in the yard. It is charged not only that the defendant must, but for its own negligence, have known, but that it in fact did know, Bassett to be an unfit and unsafe man with whom to place others at work. (See complaint, Record page 5.)

The evidence establishes the following facts: That Bassett had been in the employ of the defendant as engineer in that yard, before plaintiff was injured, about a year; (Record, pages 147, 148,) that during that time he had, by his conduct, frequently shown his negligence, recklessness and unfitness for the place; (Record, pages 66, 67, 68, 69, 70 and testimony of Rupert and Wilson at length;) that complaint had, at different times, been made of his negligent and reckless conduct, to the defendant's representative at Fargo; but that notwithstanding such complaints, he was retained in the same service, except that he was discharged two or three times temporarily for misconduct; (Record, pages, 66, 67, 70, 93, 94, 200, 202, 207 and testimony of Rupert and Wilson at length); that the plaintiff, at the time of the injury had only been in the employ of the defendant about two weeks, and only about one week with Bassett;—that he worked as night brakeman; (Record, pages, 30, 57, 132;) that on the night of the injury and about 15 or 20 minutes before the accident, the yard master called up the switching crew (who had been asleep for a short time) and ordered plain-

tiff to direct Bassett to move his engine so as to commence switching cars at a point named;—that they were in haste to get ready for a train soon to come in from the East; (Record, pages 57, 58, 64, 65,) that plaintiff, as directed by the yardmaster, urged Bassett to move promptly, on account of which angry words passed between them; (Record, pages 57-58 ib, 103-4, ib. 17, 18, 32, 33, 34;) that thereafter while, under the direction of the yardmaster, they were backing some cars, and while he was, as his duty required him to be, (49, 51, 60, 61, 106,) standing on top of and near the rear end of the head car, (the car farthest from the engine,) plaintiff gave a signal to the engineer to back seven or eight car lenghts;—that it was the duty of the plaintiff to give such signals, (page 18, 21, 22, 106,) and of the engineer to obey them,(page 21, 60, 61, 79, 94, 175, 176, 198,) and to continue backing, until he was signalled to stop;—that contrary to his duty, when he had backed about three car lengths, he, without any warning to plaintiff and without any reason or necessity therefor, (pages 63, 66, 108,) very suddenly and recklessly and negligently reversed his engine with steam on, giving the train so sudden and violent a jerk as to throw the plaintiff off and inflict the injuries complained of. (Record pages 15 to 28 inclusive, 48, 49, 50, 51, 53, 58, 59, 60, 61, 62, 63, 66, 67, 68, 69, 70, 76, 79, 80, 93, 94, 105, 106, 107, 109, 110, 112, 114, 125, 126, 127, 128, 144, 145.)

The case was tried at Fargo at the June term of District Court, A. D. 1883, and verdict rendered for plaintiff for $20,000. A motion was afterward made for a new trial on the grounds, among others, that the evidence did not

show the defendant to be guilty of any negligence in the employment or retention of Bassett, or that Bassett was an unfit, caseless or reckless engineer, or guilty of any negligence which caused the injury to plaintiff; that the evidence did show that plaintiff was guilty of contributory negligence; that the verdict was given under the influence of passion and prejudice; and for errors of law occurring at the trial, excepted to by the defendant. (Record pages 252—256.) 21 N. W. Rep 8.

This motion was after argument denied, and, from the judgment rendered on the verdict, the defendant appealed to the Supreme Court of the Territory. It affirmed the judgment. (Record, page 265.)

It may properly be stated that the plaintiff was, when injured, between 24 and 25 years old, of fine physique and of much more than ordinary ability and promise. He had a quarter section of land in one of the very desirable locations in Dakota, on which he had under cultivation 100 acres. He also had the necessary horses, agricultural implements, etc., for use on the farm. The night he was injured—the accident was about 2 o'clock in the night—he had in his possession three hundred dollars, which was sufficient to pay the last dollar he owed. *All of this property, real and personal, he had by his own unaided efforts earned and paid for.* He proposed to work the then next winter in the defendant's yard to raise money needed to carry on his farm the next summer. (Record, pages 12, 13, 26, 27, 28.) These matters are mentioned to show that plaintiff promised to become, soon, one of the prominent and substantial men of his neighborhood. The verdict, therefore,

though large, would not compensate him for his pecuniary loss, saying nothing of his mental and physical suffering. By the injury all his hopes were blasted.

POINTS.

While the exceptions in this case are numerous, the legal questions which it is deemed necessary to discuss are few.

FIRST.

The defendant insists, and the plaintiff denies, that the Court erred in sustaining the challenge to Young and Green, who were called as jurors. (Record, pages 9 to 12.) But as it is not claimed that the jury empaneled to try the case was not impartial and competent, an error of the Court in sustaining the challenge (if admitted) would not be ground for reversal.

Northern Pacific R. R. Co. vs. Herbert, 116 U. S. 642.

SECONDLY.

During the progress of the trial it is believed that but two exceptions were taken by defendant's counsel to the rulings of the Court admitting or excluding evidence: (1) to the question put to the plaintiff as a witness:—"After you learned it, how much could you have earned at your trade of blacksmith per day?" (Record, page 13;) and (2) to the question put to the witness Galvin, former yard-master of defendant:—"Prior to the injury of this plaintiff, and during the autumn when this plaintiff was injured, do

you know what the general reputation of Bassett was as to being a careful or careless or a reckless man in the performance of his duties as engineer? I simply ask you now, do you know what his general reputation was in that respect at this place—at Fargo—where this accident happened." (Record, page 69). As to the first question it can only be necessary to call attention to the fact that *it was not answered*. (See record at page 13.) The attention of the Court is particularly called to the form of the second question. "*Do you know* what the general reputation,', etc., was? To that question the witness was particularly cautioned to confine his answer; and his answer was simply, "I do." Certainly neither the question nor the answer could have prejudiced defendant.

The witness was afterward asked what that reputation was, but to the latter question or to the answer thereto there was neither objection nor exception. Whether this question or answer was proper, is, therefore, not before this Court. But if it were, on both reason and authority, it is clearly settled that it was competent, for the purpose of proving the defendant's knowledge of Bassett's character, to show his general reputation for carelessness, recklessness, etc.

Pierce on Railways, 383.

Gilman vs. Eastern Railroad Corporation, 10 Allen 233.

Gilman vs. Eastern Railroad Corporation, 13 Allen 433, 444.

Davis vs. Detroit, etc., R. R. Co., 20 Mich. 105.

Frazier vs. Penn. R. R. Co., 38 Pa. St. 104.

harton on Negligence, (2nd Ed.) section 237.

2 Thompson on Negligence, 1053, 1054.

THIRDLY.

At the close of the testimony the defendant moved the court to dismiss the action upon the following, among other grounds:

"First. Because the evidence shows clearly and fully that the plaintiff has contributed to the injury complained of."

"Fourth. Because the evidence clearly and conclusively shows that the plaintiff not only had the means of knowing, but actually did know, of the character of the engineer, Bassett, of whom he complains, and of his fitness for that employment, and that he made no complaint of Bassett, or of his unfitness, to his superior officers, but continued, having such knowledge and the means of knowledge, in the employ of the company in connection with said Bassett, who was then and there a fellow servant." (Record, page 235.)

The Court over-ruled the motion, and gave the case to the jury, the defendant excepting to the ruling.

(1.) A question raised by this ruling and which we suppose the defendant's counsel will insist is before this court is— Did the evidence conclusively show that the plaintiff was guilty of such contributory negligence as disentitled him to recover? This question was submitted to the jury fairly, and by it decided in the negative; and the district court on the motion to dismiss and again on the motion for a new trial decided that the verdict was

justified by the evidence. And the Supreme Court of the Territory on review, having all the evidence before it, affirmed this decision of the district court. This court will not under such circumstances pass upon the weight and sufficiency of the evidence.

Railroad Co. vs. Fraloff, 100 U. S., 31.

Insurance Co. vs. Folsom, 18 Wal., 248, 249.

Barreda vs. Silsbee, et al., 21 How., 166, 167.

Penna Co. vs. Werner, 89 Pa. St. R., 66.

(2.) But assuming for the purpose of the argument that the question is before this court, I contend that there is not a *scintilla* of evidence to justify even a suspicion that the plaintiff was guilty of any contributory negligence. He had been, as we have seen, only two weeks in the defendant's employ, not over one week of which time was he at work with Bassett, and that in the night. And before he went to work at that time he knew nothing whatever of Bassett. (Record, pages 16, 17). There is not a word of evidence which tends to show that plaintiff had either notice or knowledge of Bassett's character, or of his negligent or reckless habits until the switching crew, on the night of the accident, begun work after they had been asleep. The fact that other employes of defendant who had been at work in that yard with Bassett for several months or for years before plaintiff was employed knew his reputation for negligent and reckless conduct, does not tend to prove that this had come to the knowledge of plaintiff.

It is true that plaintiff as a witness stated that Bas-

sett "had been handling the engine in a reckless manner from the time he started, (after they had been asleep,) until I [he] was thrown off." (Record, page 50). And again to the question of defendant's counsel, "You stated that he had been acting recklessly all the evening after you waked him up?" he answered "Yes, sir," but it must be borne in mind that it was only *fifteen or twenty minutes before the accident that they were waked up*, (Record, page 104,) and that they were in great haste to get ready for a train that was about to come into the yard from the east. (Record, pages 64, 65, 82–3, 114). *And none of the evidence shows that any recklessness which plaintiff discovered during that time was such as would have led a reasonably prudent man to believe that it was unsafe to work with Bassett, much less that it was unsafe to remain till morning or until they had made preparation for the incoming train.* And it was competent for the jury to infer the absence of fault on part of plaintiff from the general and known disposition of men to take care of themselves and keep out of the way of danger.

North. Cent. R. R. Co. vs. The State, 29 Md., 438
Weiss vs. Pa. R. R. Co., 79 Penn. St., 390.
Penn. R. R. Co. vs. Weiss, 87 Pa. St., 447.

Such negligence will not be presumed—the burden was on the defendant to establish it; but we need not rely on the fact that the burden of proof was on defendant to show contributory negligence, and that there was no evidence offered to establish it, nor on the presumption that plaintiff exercised care. The evidence is clear and satisfactory that plaintiff was in the place were his duty called him; (Record, pages 21, 48, 49, 60, 61, 98, 106;) that he was

a careful and competent man; (Pages 65, 66;) that the jerk which threw him off would have thrown any man off; (Pages 59, 60, 94, 107.) And even if there had been very strong evidence of concurring negligence on his part the question would have been a matter for the jury and not for the court.

Hough vs. Railroad Company, 100 U. S., 225.

Penn. Co. vs. Weiss, 87 Pa. St., 449.

Lawless vs. Conn. River Co., 136 Mass., 1.

Snow vs. Housatonic R. R. Co., 8 Allen, 441.

Thomas vs. Western Union Tel. Co., 100 Mass., 156.

Looney vs. McLean, 129 Mass., 33, 36.

Dewire vs. Bailey, 131 Mass., 169.

Pierce on Railways, 314, 317, 318, 319.

Fernandes vs. Sacramento City Ry. Co., 52 Cal., 45.

Thompson vs. R. R. Co., 2, Best and Smith, (110 English Com. Law,) 106.

Hawley vs. North. Cent. R'y Co., 82 N. Y. 370.

Weber vs. N. Y. Cent. R. R. Co., 58 N. Y. 455.

Thurber vs. R. R. Co., 60 N. Y., 331.

Mayo vs. Boston and Maine R. R. Co., 104 Mass., 137, 141-2.

McCully vs. Clark, 40 Pa. St., 399, 406.

Russell vs. Minn. and St. L. R. R. Co., 32 Minn. 230.

Stodard vs. St. L. R. R. Co., 65 Mo., 514, 520–521.

Penna. R. R. Co. vs. Barnett, 59 Pa. St., 264.

West Chester R. R. Co. vs. McElwee, 67 Pa. St., 315.

Cressey vs. Hestonville R. R. Co., 75 Pa. St., 86.

Even if it had been shown that plaintiff knew Bassett, at times, to be careless or reckless, that under the circumstances would not have been absolutely conclusive of want of due care on plaintiff's part or have justified the court in taking the case from the jury.

Hough vs. Railway Co., 100 U. S., 225.

Lawless vs. Railroad Co., 136 Mass., 1, 6.

Looney vs. McLean, 129 Mass., 33, 36.

Russell vs. Minn. and St. L. R. R. Co., 32 Minn., 230.

Patterson vs. R. R. Co., 76 Pa. St. R., 389.

Ford vs. Fitchburgh R. Co., 110 Mass., 261.

Snow vs. Housatonic R. R. Co., 8 Allen, 441.

Sanborn vs. Madera R. R. Co., 70 Cal., 261.

and other cases last above cited.

FOURTHLY.

The following requests of the defendant's counsel were refused, which is alleged as error:

(1) "If the plaintiff knew, or had the opportunity of knowing, before his fall from the car in question, that Bassett was an unfit or unsafe man to run the engine in question, in that case it was the plaintiff's duty to refuse

to work with him any longer, and his failure to do so would prevent him from recovering in this suit."

(2) "The evidence adduced on behalf of the plaintiff tended to show that Bassett was guilty of negligence in running his engine during the same night on which the plaintiff was hurt, previous to the accident and while the plaintiff was working with him. If the jury believe such to be the fact it must find for the defendant." (Record pages 235, 236.)

It is not clear just what is meant by the first of these requests. A question was raised as to the fitness of Bassett—he having been, not long before the accident, promoted from the place of fireman without having had a training or education to fit him for the position of engineer. (See testimony of Rupert, page 146 et seq.)

It is not claimed by plaintiff that if Bassett was an unfit man that fact would make the defendant liable, unless such unfitness caused or contributed to the injury to the plaintiff. And it clearly was not the duty of the plaintiff to refuse to work with Bassett if his unfitness did not apparently endanger his co-employes. It will be remembered, as we have above pointed out, that there is no evidence that plaintiff had any reason to suspect Bassett's unfitness, in any respect, until about fifteen or twenty minutes before the accident. And even then there is no evidence of ought more than ill temper, until they begun to move the car from which plaintiff was thrown. That was not certainly to exceed a minute—perhaps not half a minute—before the accident. (Record, pages 17, 18, 19, 104.) And we again call attention to the fact that there is no evidence that *at any time* before the accident Bassett

was to plaintiff's knowledge guilty of any negligence or recklessness that made it unsafe to work with him. (See testimony of Yardmaster Galvin, Record, pages 54 et seq). And it is familiar law that it is not allowable to assume, as existing, facts not proven, and to ask a direction to the jury upon such assumption.

Railroad Co. vs. Gladmon, 15 Wallace, 409.

(2) By these requests, too, the defendant's counsel assumed it to be law that plaintiff was at his peril bound to leave the service *if even for a second* before he was thrown from the car, he knew or had an opportunity of knowing that Bassett was an "*unfit or unsafe*" man to run that engine, or that during that night Bassett had been "*guilty of negligence* in running his engine" even though such *unfitness or negligence* did not endanger any one employed to work with him, and notwithstanding the fact that by so summarily quitting, plaintiff would not only have endangered the train, but those on it, and perhaps the other train which was about to enter the yard from the east. It is not necessary to multiply words to show this position untenable.

(3) The court in its charge fairly and clearly stated the law on this branch of the case, and was not bound to repeat in the language of defendant's counsel.

But aside from these considerations those instructions were properly refused. It is not law that if a servant *has an opportunity to know* that a co-employe is unfit, he can not recover for injury resulting from the negligence of such co-employe. Nearly every employe *has an opportunity to know* by investigation, if he pushes it far enough, whether those employed with him are fit, etc. But it is

not incumbent on him at his peril to prosecute such investigation in any case.

"The servant, when he engages to run the risks of his service including those arising from the negligence of fellow servants, has a right to understand that the master has taken reasonable care to protect him from such risk by associating him only with persons of ordinary skill and care."

Hutchinson vs. Railway Co., 5 Exch., 353.

Noyes vs. Smith, 28, Vt., 63.

Ford vs. Fitchburg R. R. Co., 110 Mass., 240, 260.

Snow vs. Housatonic R. Co., 8 Allen, 446.

It can not be considered to be contributory negligence if the plaintiff has merely not anticipated the defendant's negligence. He had a right to assume that his master had done his duty and therefore that he had used due care to employ fit servants.

Hough vs. R. R. Co., 100 U. S., 219.

Whitaker's Smith on Neg. 387.

Robinson vs. W. P. R. R. Co., 48 Cal., 421.

Shearman and Redfield on Neg. section 31.

Reeves vs. Delaware etc. R. R. Co., 30 Pa. St. R., 454, 460–461.

Brown vs. Lynn, 31 Pa. St., 510.

Ernest vs. Hud. River R. R. Co., 35 N. Y., 28, 33, 35, 36, 40.

Porter vs. R. R. Co., 60 Mo., 160.

Conroy vs. Vulcan, 62 Mo., 35.

Dale vs. R. R. Co., 63 Mo., 453.

Wood's Master and Servant, sections 373, 395, 400.

Muldowney vs. R. R. Co., 36 Iowa, 462, 470, 471.

Ford vs. Fitchburg R. R. Co., 110 Mass., 260.

FIFTHLY.

Most, if not all, the legal propositions given in charge to the jury at the request of plaintiff's counsel, were legal axioms, unquestioned by any one. Yet to these the defendant's counsel formally excepted without the least reference to their correctness. To so except to everything said or charged is in affect no exception. Such a practice, if allowed, would defeat the ends of justice and the purpose of an exception. It would not call the attention of the Court to any particular matter questioned. It would be equivalent to a general formal exception to a charge, much of which was unquestionably correct. This formal exception we insist is a nullity. But if the several parts of the charge were properly excepted to, the defendant's case would not be helped, for every proposition therein is law. It is not deemed necessary to discuss these several legal proposition *seriatim*. That a master (whether a natural person or a corporation) is legally bound to use due or ordinary care not to expose the servant to perils against which he may be guarded by proper diligence upon the master's part, and that if the master knows or has reason to believe, after the employment of a servant, that he is careless, reckless or incompetent, it is his duty to discharge him—and that the greater the dangers to be apprehended from the negligence, incompetence or carelessness of a servant, the greater the care should be in his

selection or retention—are merely the a, b, c of the law of negligence. And that ordinary care, or due care in such cases is not merely such care as other railroad companies exercise etc., is no longer an open question in the Federal Courts.

Wabash R. R. Co. vs. McDaniels, 107 U. S., 454.

Cayzer vs. Taylor, 10 Gray, 274.

So too it is the settled law of this Court that in such cases the burden is on the defendant to show contributory negligence of plaintiff, if that is charged.

Hough vs. R. R. Co., 100 U. S. 225-6.

Indianapolis R. R. Co. vs. Horst, 93 U. S. 298.

See also

Penn. Co. vs. Weber, 76 Pa. St. R. 157.

SIXTHLY.

The verdict in this suit was rendered June 29th, 1883; (Record, page 242,) but entry of judgment was on motion of defendant stayed for several months thereafter. On February 15, 1884, defendants counsel, against the objection and exception of plaintiff's counsel, proposed numerous exceptions to the verdict, charge, etc. (Record, pages 243 et seq.) The plaintiff contends that such exceptions can not be considered.

St. Croix Lumber Co. vs. Pennington, 11 N. W. Rep., 497.

Light vs. Kennard, 7 N. W. Rep., 539.

Roode vs. Dunbar, 2 N. W. Rep., 345.

But, even if they were properly before the court, they present no new questions. They are but a reiteration in another form of the exceptions before taken.

It is also contended that many of the prayers for instructions by defendant's counsel are unwarranted by any thing apparent in the bill of exceptions, and for that reason present no question for consideration on review.

Phoenix Life Ins. Co. vs. Raddin, 120 U. S. 183, 196.

This Court will presume nothing in favor of the party alleging error; but, if compelled for any reason to resort to presumption at all, will not indulge any except such as as will sustain the judgment appealed from.

Carman vs. Pultz, 21 N. Y. 547.

Grant vs. Morse, 22 N. Y. 324.

Briant vs. Trimmer, 47 N. Y. 96.

The City of Allegheny vs. Nelson, 25 Pa. St. R. 332.

It is respectfully submitted that this case was fairly submitted to the jury and that there is no error in the record.

SEVENTHLY.

Since writing the above I have received the brief of the learned counsel for the plaintiff in error. Most of his positions have been anticipated, but it is proper to refer to some of them.

At the request of the defendant's counsel the trial

court instructed the jury that "In order to recover in this suit, the plaintiff must have established the following propositions, to-wit: (1) That the plaintiff was hurt through the negligence or improper conduct of Arthur D. Bassett. (2) That the defendant neglected to use ordinary care in the selection of Bassett as the employe for running the switch engine mentioned in the evidence. (3) That plaintiff was free from negligence on his part which contributed to this injury." (Record, page 236. See also the charge. Record, pages 239, 240, et seq.) *That there was no contributory negligence is therefore an established fact.*

See on the point subdivision "Thirdly" of this brief at length.

It is contended that the court below erred in charging that "the defendant having alleged negligence on the part of the plaintiff denominated contributory negligence it must be established by a preponderance of evidence." The court did not charge, it will be seen, "That if such negligence were established by the plaintiff's evidence the defendant could have no benefit from it, nor that the fact could only be made effectual by a preponderance of evidence, coming exclusively from the party on whom rested the burden of proof." The court merely charged that the jury could not legally find that there was contributory negligence unless that fact was shown by the evidence. This was clearly correct. See,

Indianopolis R. R. Co. vs. Horst, 93 U. S., 298-9.

The counsel quotes at length from the testimony of different witnesses to show (1) that Bassett's acts were

neither negligent nor reckless, (See his brief, pages 25, 26, 27, and (2) that plaintiff Mares was guilty of contributory negligence, (Brief, pages 28 to 31.) It is respectfully submitted that this Court is not called upon to determine where the preponderance of evidence is on every, or on any question in the case. That has been settled by the tribunal organized to try such questions of fact. See too subdivisions "thirdly, and fourthly" supra. The evidence of defendant's own witnesses Fulton, Rupert and Baker conclusively dispose of the contention that because the plaintiff was in the employ of the defendant, with Bassett, a few nights before the accident, plaintiff must have known that it was dangerous to work with Bassett. They swear that they were frequently for many months with Bassett in the yard while at work and never discover that he was a negligent, dangerous or unsafe employee.

I beg leave to refer to but one other position of the learned counsel. He contends, (brief, page 37,) that the Court below erred in refusing an instruction to the effect that "if plaintiff knew or had an opportunity of knowing Bassett's unfitness he could not legally recover," and in support of this he quotes the language of section 214 of Wharton on Negligence as follows:

"When an employe, after having an opportunity to become acquainted with the risks of his situation, voluntary accepts them, he can not complain if he be subsequently injured by such exposure."

It is admitted that

"An employee who undertakes the performance of hazardous duties assumes such risks as are incident to their discharge from causes open and obvious, the dangerous character of which causes he has had an opportunity to ascertain."

This is as far as reason or the authorities go.

The learned counsel would have discovered—had he examined the later edition of the work from which the above extract was taken—that the language by him above quoted is omitted from Sec. 214 and the following language inserted:

"An employe, however, is not bound to inquire as to latent defects. He has a right to persume that this inquiry was made by his employer on whom devolves the duty. And although the servant may know of the defect, this will not defeat his claim unless he know that the defects are dangerous. The servant can be only said to assume a risk which is either announced to him in advance, or which is a natural and ordinary incident to the employment, or which from facts before him it was his duty to infer."

Wharton on Negligence, Section 214.

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